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# DECISIONS

OF

# The COURT of SESSION,

From the beginning of FEBRUARY 1752,
to the end of the year 1756.

K. Scotland
Session, Court of

COLLECTED

BY

Mr THOMAS MILLER,
Mr ROBERT BRUCE,
Mr JOHN SWINTON *junior*,
Sir DAVID DALRYMPLE,
Mr JOHN DALRYMPLE,
Mr WALTER STEUART,

ADVOCATES.

By APPOINTMENT of the FACULTY of ADVOCATES.

EDINBURGH:
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MDCCLX.

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# THE FACULTY OF DECISIONS



THE Faculty of Decisions, being applied to, by several of the Gentry, to
accept of a Trust in the Management of a Work of this Nature:
Such a Talk was found to require more Time than any one Advocate could pretend
to spare from the Duties of his Profession: Such Incumbrances are, nu-
merous as the Pebbles on the Beach from which and an Example and Se-
curity for the Payment of the Purchase Money, the Faculty have thought
proper to appoint

A Bill of the Names of the Parties, an Epitome of the Process of the
Points at Issue on the Pleadings abbreviated from the Briefs and an Ample and Se-
curity Index, are all included in this Collection.

Some few Cases to illustrate this Part of the Work, will be placed first
in order, as the Principles established therein, are of the most Importance. Such Incumbrances are, nu-
merous as the Pebbles on the Beach from which and an Example and Se-
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# DECISIONS

# ADVERTISEMENT.

THE Faculty of Advocates had been accuſtomed to charge one of their number with the care of drawing up and publiſhing an account of the moſt remarkable caſes decided in the court of Seſſion. Such a taſk was found to require more time and care than any one Advocate could beſtow. It was therefore judged expedient to commit this office to a certain number of Advocates, who, by dividing the work, might, in ſome meaſure, anſwer the expectations of the Faculty.

THE caſes remarked in conſequence of this appointment, from the beginning of February 1752 to the concluſion of the year 1756, are now ſubmitted to the public. It has been the aim of thoſe employed in this work, to ſtate, with preciſion, the facts neceſſary to be known, the principal arguments uſed by each party, and the final judgments of the court.

SOME few caſes of moment may have been omitted, while place has been given to others of leſs importance. Such inaccuracies are unavoidable at the beginning of a work of this nature.

A liſt of the names of the parties, an abſtract of the decrees of the houſe of Peers on the judgments appealed from, and an ample and accurate index, are all ſubjoined to this collection.

THE printed papers relating to the caſes in each year, have been bound up, and are lodged in the Advocates library.

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# DECISIONS

OF

# The COURT of SESSION,

N° I. 4th *February* 1752.

*BELL*

againſt

*DUNDAS.*

*Undas* purſued *Bell* before the Juſtices of the Peace, for having injured him by a defamatory libel.

*Pleaded* for *Bell*, in a bill of advocation: Juſtices of the Peace have no juriſdiction in the crimes of ſlander and defamation, which muſt, in the firſt inſtance, be tried before the Commiſſaries.

*Anſwered* for *Dundas*: The libel contains expreſſions which import a threatening to break the peace; and, beſides, it reflects on *Dundas* for words uttered by him at the quarter-ſeſſions held by the Juſtices of the Peace, who therefore are proper judges of an injury offered to a member of their court. Even judges of inferior rank, and leſs authority, may puniſh injuries offered to any of their number, on account of words uttered, or things done in court; as appears from the deciſion 14th *November* 1679. *Magiſtrates of Kirkaldy* againſt *Dougal*.

"The Lords refuſed the bill of advocation." D

Act. *A. Lockhart*. Alt. *R. Dundas*. Reporter, *Woodhall*.

N° II. 7th *February* 1752.

*CLARK*

againſt

*WADDEL.*

IN a competition of the creditors of *Summerhouſe*, *Clark* objected to *Waddel*'s ſeiſin, that it was null by the act 17th Parl. 1686, becauſe the atteſtation of the notary did not narrate of what number of leaves the ſeiſin conſiſted.

*Anſwered* for *Waddel*: 1*mo*, This atteſtation is not an indiſpenſable ſolemnity; for that the ſtatute does not declare the omiſſion of it to be a nullity.

2*do*, All the pages of which this ſeiſin conſiſts, are ſigned both by the notary and the witneſſes, ſo that no leaf could be foiſted in, nor the tenor of the ſeiſin altered: in this manner has the court conſtantly interpreted the 15th act Parl. 1696, *allowing ſecurities*, &c. *to be written bookways*, which is conceived in the ſame terms with the ſaid act 17. Parl. 1686: for, in the caſes *Hamilton* againſt *Cairnhill*, *Nov.* 21. 1710, and *Watſon* againſt *Durham*, *Decem.* 12. 1728, the objection, that the number of pages was not mentioned in the laſt Page, was repelled, becauſe there was no poſſibility of interpolation.

3*tio*, *et ſeparatim*, The atteſtation of the number of leaves had been omitted by the uniform practice of all notaries, until the year 1730, when this objection was moved, in the caſe, *Lady Sinclair* againſt *Sir James Stewart*; nor was the contrary cuſtom fully eſtabliſhed in the year 1741, when a queſtion ſimilar to this, occurred in the caſe of the *Duke of Roxburgh* againſt *the feuars of Kelſo*; in which caſe, the Lords, "In "conſideration of the practice, and the great and general miſchief that "might enſue to the lieges, if the objections made to the ſeiſin were "ſuſtained, repelled the objection, and ſuſtained proceſs." It is true, that the Lords reſolved to enforce the obſervance of the ſaid ſtatute 1686, by an act of *ſederunt*; but this act has never yet been made; and as this caſe is the ſame with that of *the Duke of Roxburgh*, the like judgment may be expected.

*Replied* for *Clark*: 1*mo*, If a form eſtabliſhed by a ſtatute, may be omitted without incurring a nullity, that ſtatute may, at all times, be eluded.

2*do*, The erroneous practice of notaries in former days, cannot afford any argument in defence of a ſeiſin, dated in the year 1748; when it is conſidered, that, from the year 1730, when this objection was firſt moved, the cuſtom began to be reformed; and that, ever ſince the 1741, the general practice of notaries has been agreeable to the ſtatute, as appears from a declaration ſigned by the deputy-keeper of the regiſter of ſeiſins at *Edinburgh*.

3*tio*, The caſe of *the Duke of Roxburgh* againſt *the feuars of Kelſo*, is not in point; for the perſons objected to the Duke's ſeiſin did not pretend any right to the ſubjects contained in his charter and infeftment; and, beſides, that ſeiſin had been a title of poſſeſſion for upwards of 40 years, and was dated at a time when notaries univerſally omitted the ſolemnity in queſtion: nor could there be any ſuſpicion of fraud in that ſeiſin; for the beginning of the precept was ingroſſed in the firſt page, and the end of it in the laſt.

"The Lords repelled the objection to the ſeiſin, in reſpect of the ge-
"neral non-obſervance of the act 1686, with regard to enumerating
"the pages or leaves of ſeiſins written bookways; as appears in the
"caſe betwixt *the Duke of Roxburgh*, and *John Knox* and *Andrew Hall*,
"marked in the book of ſederunt; and that the ſaid act has not yet
"been regularly obſerved."

D

For Clark, *R. Craigie*. For Waddel, *A. Lockhart*. Reporter, *Woodhall*.

## N° III.

N° III. 18th *February* 1752.

Captain *JOHN GORDON*

againſt

His Majeſty's ADVOCATE.

IN this caſe *, upon an appeal taken by his Majeſty's advocate, the decree of the Court of ſeſſion, dated the 16th *November* 1750, was reverſed, and in part varied by judgment of the houſe of Lords; whereby it was, *inter alia*, adjudged, " That Sir *William Gordon* (the perſon attainted) " being, under the ſettlement made by his father Sir *James Gordon*, ſeiſed of " an eſtate tailzie, in the barony and eſtate of *Park*; notwithſtanding " ſuch tailzie was affected with prohibitive, irritant and reſolutive clauſes, " the ſaid barony and eſtate did, by virtue of 7. *Ann. cap.*21. become for- " feited to the Crown, by the ſaid Sir *William Gordon*'s attainder, during " his life, and *the continuance of ſuch iſſue-male of his body, as would have* " *been inheritable to the ſaid eſtate-tailzie, in caſe he had not been attainted*; " as alſo for ſuch eſtate and intereſt as was veſted in, or might have been " claimed by the ſaid Sir *William Gordon*, by virtue of the laſt limitation " in the ſaid ſettlement, to the heirs and aſſigns whatſoever of the ſaid " Sir *James Gordon*, after all the ſubſtitutions therein contained ſhall be " expired and determined; and that, by virtue of the ſubſtitution to the " heirs-male of the ſaid Sir *James Gordon*'s body, of his then preſent " marriage, the reſpondent, *John Gordon*, hath right to ſucceed to the " ſaid barony and eſtate of *Park*, after the death of the ſaid Sir *William* " *Gordon*, and *failure of ſuch iſſue-male of his body as aforeſaid*, according " to the limitations in the ſaid ſettlement; and that liberty be reſerved to " the Crown, and alſo to the ſaid *John Gordon*, and any other perſon that " may become intitled to the ſaid barony and eſtate of *Park*, by virtue of " any of the ſaid ſubſtitutions, to apply to the Court of ſeſſion for ſuch fur- " ther order and direction in the premiſes, as ſhall be juſt, as often as any " new right ſhall accrue to them reſpectively, in conſequence of any of " the ſubſtitutions or limitations in the ſaid ſettlement."

Soon after this decree, Sir *William Gordon* died in *France*, leaving iſſue-male, two ſons born out of the ligeance of his Majeſty. Whereupon *John Gordon* applied to the Court of ſeſſion, and *contended*, that the ſaid ſons were aliens at common law, and were not naturalized by 7. *Ann. cap.* 5. (which naturalizes all the children of natural born ſubjects, born out of the ligeance of his Majeſty); becauſe by 4. *Geo.* II. *cap.* 21. the children of perſons attainted of high-treaſon, are expreſsly excluded from the benefit of the ſaid act 7. *Ann.* that therefore theſe children were not inheritable to the eſtate-tailzie, and, in terms of the ſaid decree, the crown's right was determined, and the ſucceſſion was open to him.

*Anſwered* for his Majeſty's advocate, That, even ſuppoſing theſe children were aliens at common law, yet they were naturalized by 7. *Ann. cap.*5. and, as to this caſe, did not fall under the exception of 4. *Geo.* II. *cap.* 21. ſeeing the decree of the houſe of Lords expreſsly declares, that the Crown's right ſhall continue, *during the continuance of ſuch iſſue-male of* Sir William's *body, as would have been inheritable to the ſaid eſtate-tailzie, in caſe he had not been attainted.* Now, in caſe he had not been attainted, the exception

* The firſt part of this caſe does not fall under this collection.

exception of 4. *Geo.* II. could have had no place; ſo neither can it have place, if the caſe is to be conſidered, as if he had not been attainted.

Upon this debate, the Lords, on the 22d *November* 1751. found, "That "*John Gordon* has no right to enter upon the poſſeſſion of the eſtate of "*Park*, during the natural life of the ſons of Sir *William Gordon* attaint-"ed; and that the eſtate belonging to Sir *William Gordon* and his ſons, "being entirely forfeited by Sir *William*'s attainder, the after-exiſtence of "a ſon or ſons, tho' inſiſted on to be aliens, cannot cut off the Crown's "right, or make place for Captain *Gordon*, ſo long as theſe ſons live, who "would have ſucceeded to Sir *William*, if he had not been attainted; and "therefore diſmiſs the petition."

*John Gordon*, after the diſmiſſing of this claim, applied again to the Court, upon a new footing, ſeparate from any conſideration of Sir *William*'s attainder. He ſet forth, that the ſaid Sir *William Gordon*, the attainted perſon, after the concluſion of the war with *France*, had, without leave of his Majeſty, continued himſelf, and inliſted other ſubjects of *Britain* as ſoldiers in the ſervice of the *French* King; and that the ſaid ſons were born abroad, after the concluſion of the war, during Sir *William*'s continuance in the ſaid ſervice and practice of inliſting; and were ſtill alive. Upon theſe facts he *argued*, that as, by the ſaid act of the 4. *Geo.* II. *cap.* 21. it was provided, that the 7. *Ann. cap.* 5. ſhould not naturalize any children born out of the ligeance of the Crown, "Whoſe fathers, at the "time of the birth of ſuch children, were liable to the penalties of high-"treaſon, or felony, in caſe of returning into this kingdom without the "licence of his Majeſty;" and as it was provided by *Geo.* II. *cap.* 30. "That, if any ſubject of *Great Britain*, ſhall inliſt himſelf, or procure "any other ſubject to inliſt to ſerve any foreign ſtate, as a ſoldier, with-"out licence of his Majeſty, he ſhould be guilty of felony, without be-"nefit of clergy." That therefore, Sir *William* being guilty of felony, by the act laſt mentioned, his children, upon account of that felony, were excluded, by the ſaid act 4. *Geo.* II from the benefit of 7. *Ann. cap.* 5. that is, were continued aliens as they were born, and were not inheritable to the eſtate, even although Sir *William*, their father, had never been attainted.

*Anſwered* for his Majeſty's advocate: 1*mo*, That, by the law of *Scotland*, as well as by the *Roman* law, which the law of *Scotland* follows, the children of natural born ſubjects, although ſuch children were born abroad, were, nevertheleſs, held to be natural born ſubjects, and were not deemed to be aliens; ſo that, if theſe ſons had even fallen under any of the exceptions of 4. *Geo.* II. they might have been aliens in *England*, and incapable to ſucceed to lands there; yet they would not have been ſo in *Scotland*; ſeeing that act only excludes from the benefit of 7. *Ann. cap.* 5. but not from the benefit of the common law.

2*do*, But, in fact, the children do not fall under any of the exceptions of 4. *Geo.* II. particularly, they do not fall under that one, which, by a ſort of analogy, Captain *Gordon* would bring them under, *viz.* of being the children of one liable to the penalties of felony, in caſe of returning to *Great Britain* without licence. This was not Sir *William's* caſe: it may be true that he was guilty of felony, on 9. *Geo.* II. but then it is neither the children of perſons guilty of felony in general, far leſs of perſons guilty of the felony in 9. *Geo.* II. which are excepted by 4. *Geo.* II. from the benefit of 7. *Ann.* It is only the children of perſons, whoſe *re-*

*turning*

*turning* alone makes them felons. By many acts of Parliament, certain offenders, ſmugglers for inſtance, are baniſhed from *Great Britain*, under this condition, that, in caſe they return, they ſhall be liable to the penalties of felony. By the ſaid act 4. *Geo.* II. the children of ſuch perſons are excluded from the benefit of 7. *Ann. cap.* 5. but it follows not from thence, that this excluſion is added to the puniſhment of all felonies whatever.

3*tio*, After the eſtate devolved to the crown by Sir *William*'s attainder, no ſupervenient incapacity in him or his inheritable iſſue, particularly, if ſuch incapacity ſhould ariſe from his or their after crimes, can avail to determine the Crown's right.

" The Lords rejected Captain *Gordon*'s claim." S

Act. *A. Lockhart.* Alt. *Solicitor Haldane. And. Pringle.* Clerk *Gibſon.*

N° IV. 20th *February* 1752.

## *JOHN DRYSDALE* Supplicant.

*John Dryſdale*, a merchant, became bankrupt: and being laid in priſon for debt, he brought a *ceſſio bonorum*. His creditors did not oppoſe him: neither did they make any objection to the condeſcendence of loſſes given in by him, or to the honeſty of his character. But a doubt being moved by the Court, whether his wearing the dyvour's habit could be diſpenſed with, unleſs he ſhould bring a proof of his loſſes; he was allowed to bring a proof of the verity of the condeſcendence: upon which he applied to the Court, ſetting forth; that his inſolvency was chiefly occaſioned by ſeizures of his ſmuggled goods; but that, if a proof of this was required, the Court could not expect a very accurate one; becauſe dealers in ſmuggled goods uſe ſo much art, to conceal their property in ſuch goods, that it becomes next to impoſſible to prove that property. However, upon the footing that his allegations were true, he hoped his concern in ſmuggling would not alone be a ſufficient reaſon, for refuſing to him, what was never refuſed to any bankrupt, where the creditors did not, upon juſt ſuſpicion of fraud, inſiſt on a ſtrict interpretation of the act of 1696. *William*, ſeſſ. 6. *cap.* 5. That this was the more reaſonable, as he produced certificates of an honeſt character in other reſpects.

The Lords were of opinion, that ſeeing the loſſes were occaſioned by ſo pernicious a practice, they could not diſpenſe with the ſtricteſt interpretation of the act of Parliament.

" They refuſed to diſpenſe with the habit." S

Act. *And. Pringle.* Clerk *Kirkpatrick.*

N° V. 21ſt *February* 1752.

## *DUNLOP*

againſt

## *JAP*, and others.

*James Jap* merchant was a creditor of *William Forbes* merchant, and was alſo his ordinary agent, and knew all his affairs. When *Forbes* became inſolvent, he formed, with the privity of *Jap*, a ſcheme to com-

 miſſion,

miſſion goods from abroad on credit, before his bankruptcy ſhould be publick, and to lodge them in *Jap*'s hands, that he might diſpoſe of them, and ſatisfy with the price the debt due to himſelf. In purſuance of this ſcheme, he commiſſioned a parcel of goods from *Dunlop*, merchant in *Holland*, on a pretended joint credit, and took care that they ſhould come into the hands of *Jap*, who ſold them accordingly. But the Lords, on the 18th *January* 1752, " found the property of the goods was not tranſ-" ferred from, but remained with *Dunlop*; and therefore preferred him " to the price."

The 2d part of that caſe is as follows.

A few days after *Forbes* had commiſſioned the ſaid goods, he went over to *Holland*, and bought from the ſame *Dunlop*, on his own credit, a ſecond parcel of goods, which in like manner came to the hands of *Jap*. He, at the deſire of *Forbes*, employed one *Spark*, a common porter, to diſpoſe of the goods to *Robert Napier*. *Spark*, without ever mentioning the name of *Forbes*, ſold and delivered the goods, and took *Napier*'s receipt for them. *Jap*, diſſatisfied with this, and deſirous to have a bill for the price payable to himſelf, ordered *Spark* to go back to *Napier*, and get ſuch a bill. *Napier* refuſed to grant it ſo, but gave one payable to *Spark*. *Jap* arreſts in the hands of *Spark* the porter: other creditors after him do the like: and, laſt of all, *Dunlop* arreſts in the hands of *Napier* the purchaſer.

*Argued* for *Dunlop*, That *Spark* was only employed, by the order of *Forbes*, as a hand to receive the goods from the ſhip, and diſpoſe of them for his behoof. *Spark* was never proprietor of the goods, nor debtor for the price. The price was not attachable for his debt. All he had to do, was to deliver up the bill; and, by ſo doing, he was acquitted from any demand. Therefore an arreſtment in his hands was of no avail.

*Pleaded* for *Jap*, and the other arreſters in *Spark*'s hands, That as *Spark* had ſold the goods, and taken a bill for the price payable to himſelf, he was to be conſidered as the creditor for the price, and *Napier* was to be conſidered as debtor to him alone. That tho' *Spark* might be accountable to *Forbes* for the bill, yet that did not alter the caſe. Therefore the arreſtments in *Spark*'s hands, as being the firſt, were preferable.

On the part of *Jap* and the others, were referred to, the caſe of *Boyleſton* againſt *Robertſon* and *Flemin*, 24th *January* 1672; and the caſe of Sir *Harry Innes* againſt the creditors of *Ludovick Gordon* 1739. On the part of *Dunlop*, were cited, the competition of the creditors of *Andrew Thomſon* 1735, and the caſe of *Carmichael* againſt *Hardys* 1741.

" The Lords found *Dunlop* preferable, upon his arreſtment in *Napier*'s " hands."

It is to be obſerved in this caſe, That *Dunlop* inſiſted greatly to have the ſale reduced which was made by him of this ſecond parcel of goods, in like manner as the ſale of the firſt parcel had been, on account of *Forbes*'s fraud, and *Jap*'s acceſſion thereto: and the court ſeemed to be of opinion, that, had the goods been extant, there was ſufficient evidence of the fraud to have annulled the ſale: but, as the goods were diſpoſed of to a *bona fide* purchaſer, ſome of the judges made a doubt how far the price was a *ſurrogatum*, or upon what *medium Dunlop* could be preferred to it, otherwiſe than according to his diligence. They therefore waved determining the general point.

s

Act. *A. Lockhart*. Alt. Clerk *Pringle*.

N° VI.

N° VI. 25th *February* 1752.

## *FORBES*
against
## *MAINS.*

IN the year 1747, *Andrew Forbes* merchant in *Leith* obtained decreet againſt *Elizabeth Rolland* merchant in *Anſtruther*, for payment of a ſum ſhe owed him by bill; but, before he could recover his money, *Rolland* was caſt into priſon by her other creditors. She remained there for ſome months, and then obtained a decreet of *ceſſio bonorum*. Being thus ſet at liberty, ſhe began to trade as formerly; and, at two ſeveral times, commiſſioned wines from Meſſ. *Mains* and company, merchants in *Liſbon*, (with whom her deceas'd huſband had been accuſtomed to deal), and paid the price. In the year 1750, near a year and a half after the *ceſſio bonorum*, ſhe commiſſioned a third parcel of wine from *Mains* and company; which, upon its arrival at *Leith*, was arreſted by *Forbes*, upon his former diligence. *Mains* and company appeared before the Judge-Admiral by their factor, and pleaded their preference to the wine; for that *Rolland* had concealed from them the condition of her affairs, and therefore, as *dolus dedit cauſam contractui*, delivery could not tranſmit the property. The Judge-Admiral preferred *Mains* and company. *Forbes* raiſed a reduction, and the caſe was reported by Mr. *Henry Home* of *Kaims*, Lord Probationer.

*Pleaded* for *Forbes*: 1*mo*, In this caſe, the ſale was compleated by delivery, and there was no fraud which could found a reduction of it; for *Rolland* had been declared a bankrupt, in the moſt publick and ſolemn manner known in our law, and her correſpondents either knew or might have known her ſituation.

2*do*, A contract of ſale cannot be reduced upon the inſolvency of the buyer at the time of contracting, unleſs he *ceſſit foro* immediately after the purchaſe; for, from the *ceſſio* alone, it is preſumed, that the buyer had a fraudulent intention of diverting the goods to his own uſe, or to that of ſome favourite creditor, without ſatisfying the ſeller; 7th *December* 1736, Sir *John Inglis* of *Cramond* againſt the *Royal Bank*. Now theſe principles cannot be applied to the preſent caſe: *Rolland* made no *ceſſio foro* immediately after the purchaſe; her circumſtances are, at this day, no worſe than when ſhe commiſſioned the wine from Meſſ. *Mains*, and paid the price; as ſhe would have done alſo in this caſe, had not the wine been arreſted.

3*tio*, If the decree of the Judge-Admiral is ſuſtained, the conſequences muſt be fatal to trade; for a perſon who has become bankrupt, and made a *ceſſio bonorum*, can never have a poſſibility of bettering his condition, if every merchant dealing with him, be permitted to reclaim the property of goods already ſold and delivered.

*Anſwered* for Meſſ. *Mains*: 1*mo*, They were ignorant of *Rolland*'s circumſtances, and dealt with her upon no other recommendation, but that they had dealt with her deceas'd huſband. A *ceſſio bonorum* made by ſo mean a trader, in the obſcure town of *Anſtruther*, could be little known even in *Scotland*, and not ſo much as reported at *Liſbon*. In fact, Meſſ. *Mains* never heard of her *ceſſio bonorum*, till after the arreſting of the wine by *Forbes*. The truth of this aſſertion appears, from their having ſent her three ſeveral parcels of wine, and always taken the bills of loading in

her

name; which, if they had ſuſpected her bankruptcy, they would never have done.

2*do*, The diſtinction between a perſon who *cedit foro* immediately after contracting, and one who *ceſſerat foro* before contracting, can have no influence in determining the point in law; for a perſon who is already bankrupt, and induces another to deliver goods to him, by concealing his circumſtances, is guilty of even greater fraud than he is, who, being in credit, contracts, and immediately after becomes bankrupt; ſince the latter may entertain ſome expectation of retrieving his affairs, the former none. In the preſent caſe, *Rolland* muſt have been guilty of fraud, as ſhe knew ſhe could not pay the price of the goods ſhe had commiſſioned, and that they were liable to be attacked by her creditors.

3*tio*, As to the argument in favour of commerce, it does not appear how a bankrupt can ever, as the law of *Scotland* now ſtands, trade to any advantage, without having previouſly made ſome ſort of compoſition with his creditors; and, be that as it will, he cannot, without injuſtice, trade upon the riſque of thoſe who are ignorant of his real condition.

" The Lords repelled the reaſons of reduction." D

Act. *And. Pringle.* Alt. *Ja. Philp.* Reporter, *Kaims.*

N° VII. 26th *February* 1752.

Lady *JEAN SCOT*

againſt

The Duke of *BUCCLEUGH.*

*ANne* Ducheſs of *Buccleugh* was poſſeſſed of the family-eſtate under a ſtrict entail; but, having purchaſed the lands of *Eaſt-Park*, and ſeveral other lands, ſhe, on the 13th *April* 1731, executed a ſettlement thereof in favours of her great-grandſon *Francis*, afterwards Earl of *Dalkeith*, eldeſt ſon of *Francis* Duke of *Buccleugh*, and the heirs of his body; whom failing, to Lord *Charles Scot*, ſecond ſon to the Duke, and the heirs of his body; whom failing, to the Duke of *Buccleugh*, and the other heirs therein mentioned, ſubject to the conditions, clauſes, irritant and reſolutive, uſual in ſtrict entails. Upon this ſettlement the Earl was infeft.

Of the ſame date with the ſettlement, the Ducheſs granted a bond for 20,000 *l.* Sterling, payable by her Grace, her heirs and ſucceſſors whatſomever, to the ſaid Lord *Charles*, and the heirs of his body; whom failing, to the ſaid *Francis* Earl of *Dalkeith*, and the heirs of his body; whom failing, to Lady *Jean Scot*, eldeſt daughter to the Duke of *Buccleugh*, and the heirs of her body; whom failing, to return to her Grace, and her heirs. The bond contains an obligation to give infeftments in the lands of *Eaſt-Park*, and others, purchaſed by the Ducheſs, for ſecurity of the payment of the ſaid proviſion: and, in conſequence thereof, Lord *Charles* was infeft.

Lord *Charles Scot* died in the month of *July* 1747, and thereby the ſucceſſion of the foreſaid bond opened to the Earl of *Dalkeith*; and, on the 15th of *Auguſt* 1748, the Earl granted a bond of proviſion to his ſiſter Lady *Jean Scot*, narrating the foreſaid 20,000 *l.* bond; and that the ſucceſſion

ceſſion thereof had fallen to him; and that the ſaid Lady *Jean* was unprovided by her father; and therefore "obliging himſelf, his heirs and "ſucceſſors, in the foreſaid heritable bond of proviſion, to content and "pay to the ſaid Lady *Jean*, her heirs, *&c.* the ſum of 15,000 *l.*" at the terms mentioned in the bond, with annualrent, *&c.*" "to the end ſhe "might, upon the ſaid obligation, charge him to enter heir in ſpecial to "his brother Lord *Charles*, and might thereupon obtain an adjudication "of the foreſaid bond, redeemable upon payment of 15,000 *l.* and the intereſt thereof." And the bond contains a proviſo, "That no diligence "ſhould be competent thereupon againſt the perſon, or other eſtate of "the Earl, except the foreſaid proviſion granted to the ſaid Lord *Charles* "*Scot*, and the foreſaid heritable bond granted to him, and infeftment "following thereupon."

This proviſion being made for Lady *Jean*, *Francis* Duke of *Buccleugh*, on the 4th of *March* 1749, diſponed the fee of the whole family-eſtate in *Scotland* to the Earl of *Dalkeith* (except in ſo far as it had been formerly diſponed to the ſaid Earl in his contract of marriage); and, of the ſame date, conveyed to the Earl his houſhold-furniture in *Scotland*, and alſo ſettled upon him the whole perſonal eſtate in *Scotland* that ſhould belong to the Duke at his death.

Lady *Jean Scot* was proceeding to affect the foreſaid 20,000 *l.* bond, by legal diligence upon the bond or obligation granted to her by the Earl of *Dalkeith*. But, the Earl dying in *April* 1750, before the decreet of adjudication was pronounced, her diligence proved ineffectual.

The Earl was ſucceeded by his infant ſon, who was ſerved heir of proviſion to him in the whole family-eſtate, and who alſo attained poſſeſſion of the houſhold-furniture, which had been diſponed to the Earl as abovementioned.

After all theſe tranſactions, *Francis* Duke of *Buccleugh* alſo died.

Lady *Jean Scot* brought a proceſs againſt the ſaid infant (now Duke of *Buccleugh*) and his tutors, upon the bond granted to her by the Earl, in order to obtain a decreet of conſtitution, that ſhe might thereupon adjudge the foreſaid heritable bond of 20,000 *l.*

*Pleaded* for the Duke and his tutors, That although the tutors are very ſenſible of the melancholly ſituation of the purſuer, in caſe it ſhall be found, that the bond of proviſion, purſued on, hath become ineffectual by the accident of the Earl of *Dalkeith*'s death; yet they not only have no power to relieve her, but are obliged to ſtate the following defences, competent to their pupil, againſt this action of conſtitution, *viz.*

1ſt, By the bond purſued on, the Earl bound only his heirs ſucceeding to him in his brother Lord *Charles*'s bond of proviſion; and, by the Earl's death before he made up titles to this bond, he never can have heirs therein; for, if the defender make up a title to this bond, he can only do it by a ſervice, as heir to the ſaid Lord *Charles Scot*, and will not thereby be liable to fulfil the foreſaid bond or obligation granted by his father to the purſuer.

2dly, The purſuer's bond of proviſion, contains an expreſs condition, that it ſhould not affect the Earl's perſon, or other eſtate, except Lord *Charles*'s bond of proviſion alone; and, therefore, tho' the defender has ſucceeded to his father in the family-eſtate and moveables, yet this cannot

be available to the purſuer, becauſe of the ſaid limitation or condition in the bond.

*Anſwered* for the purſuer, That the Earl's obliging his heirs ſucceeding to the 20,000 *l.* bond, might have given relief to the Earl's other heirs, had they been different; yet ſtill, as he obliges himſelf, he thereby bound his whole repreſentatives, of whatever denomination: and as the defender is heir ſerved to the Earl, he is, upon that paſſive title, bound to implement the Earl's bond. As to the reſtrictive clauſe in the bond purſued on, the purſuer only inſiſts for a decreet of conſtitution, *ad hunc effectum*, That ſhe may, on ſuch decreet, charge the defender to enter heir in ſpecial to Lord *Charles Scot*, in the foreſaid bond of proviſion; to the end, ſhe may thereupon adjudge the foreſaid bond from the defender.

*Obſerved* on the bench, That when one binds his heirs in a certain ſubject, he binds theſe who might be heirs to him in that ſubject, tho' they make up their titles to the ſubject, as heirs to a remoter predeceſſor, and paſſing him by, if they be alſo his heirs general.

It was alſo obſerved, That the binding of heirs in the obligation to the purſuer, was intended for the event of the adjudication's not being led in the Earl's lifetime; for, had it then been led, there would have been no occaſion for binding his heirs; but the binding theſe implied, that the Earl ought to make up titles to the bond, that he might have heirs therein, and his heirs are bound to ſupply what he did not do.

" The Lords found, That, in reſpect the ſucceſſion to the heritable " bond of 20,000*l.* granted by *Anne* Ducheſs of *Buccleugh*, to Lord " *Charles Scot*, and the heirs of his body; whom failing, to the " deceas'd *Francis* Earl of *Dalkeith*, and the heirs of his body; had " now, by the death of the ſaid Earl, devolved to the defender his " eldeſt ſon and heir; and that the defender was heir ſerved and re- " toured to the ſaid Earl, the granter of the bond now ſued for; " and had ſucceeded to him in all his other eſtates; therefore he was " liable to perform and make good the ſaid bond for 15,000 *l. Ster- " ling*, and intereſt thereof, granted by the ſaid Earl to the purſuer, " ſo as effectually to give her ſecurity, in the ſaid heritable bond of " 20,000 *l. Sterling*, and infeftment following upon, for ſecurity and " payment to her of the ſaid 15,000 *l. Sterling*, and intereſt thereof, " and penalty, if incurred; but not to affect the defender's perſon, " nor his other eſtate.

B

Act. *A. Lockhart* and *R. Dundas*. Alt. *Ja. Ferguſon* and *Jo. Grant*. Reporter, Lord *Minto*. Clerk *Forbes*.

## N° VIII. 26th *February* 1752.

*JOHN STRACHAN*, late Tenant in *Redfoord*,

againſt

Lieutenant *ARCHIBALD MACLAUCHLAN*.

INformation having been given to the officers commanding his Majeſty's troops, who were in purſuit of the rebels in 1746, that *John Strachan* had been in the rebellion, they ordered him to be apprehended, and his goods

goods to be ſeized. Accordingly, on the 26th of *February* 1746, Lieutenant *Maclauchlan*, with a party of ſoldiers, apprehended *Strachan* in his own houſe, ſeized all his horſes, cattle and ſheep, and carried him priſoner to *Aberdeen*; and the goods were delivered to the Commiſſary for the army, who, by orders from the general officers, ſold them, and accounted to the government for the price. *Strachan* remained priſoner for ſome months, but afterwards was diſmiſſed.

He brought an action of ſpuilzie and damages againſt Lieutenant *Maclauchlan*; and inſiſted, that he had continued loyal during the rebellion, and was living peaceably at home when the ſpuilzie was committed: that therefore, tho' the acts of indemnity might extend to juſtify the apprehending ſuſpected perſons, preſſing horſes, carriages, *&c.* for the King's ſervice, entering houſes, quartering ſoldiers, and ſuch like, during the rebellion; yet it could never juſtify the robbing an innocent perſon of all his effects.

*Anſwered* for the defender, That it was the duty of the officers of the army to apprehend the perſons, and ſeize the goods of all concerned in the rebellion; and, in the diſcharge of that duty, it was impoſſible, in every inſtance, to avoid committing of miſtakes: that it was chiefly to ſecure them from the conſequences of ſuch miſtakes, that the acts of indemnity were made. This is evident from the generality of the words of theſe acts. It is not neceſſary to prove the purſuer's acceſſion to the rebellion. It is ſufficient that he was ſuſpected thereof, and that the officers were ſo informed; and that the goods were ſeized, "with an intention to ſuppreſs "the rebellion, for the preſervation of the publick peace, or for the ſer-"vice and ſafety of the government;" and were not converted to the private uſe of the ſeizers, but were diſpoſed of on account of the publick: that as the purſuer can have no action for wrongous impriſonment, ſo neither can he have any for the ſeizure of his goods.

"The Lords found the defender intitled to the benefit of the acts of "indemnity; and therefore ſuſtained the defence, and aſſoilzied." B

Act. *Ja. Ferguſon*, *Lockhart*, and *Burnet*. Lord *Milton*. Alt. *Ro. Craigie*, *Ja. Dundas*, and *Bruce*. Reporter, Clerk *Kirkpatrick*.

N° IX. 3d *June* 1752.

*ARCHIBALD STEWART* Writer to the Signet,

againſt

*ALEXANDER* Earl of *GALLOWAY*.

THE deceas'd Sir *James Stewart* of *Burray* was, in the year 1726, purſued criminally, before the court of Juſticiary, for the murder of Captain *James Moodie*, and fugitate for non-compearance.

Afterwards Sir *James* came privately to *London*, and applied to *James Stewart* of *Torrence*, to ſolicit a pardon for him from his Majeſty; and, on the the 4th *September* 1730, Sir *James* executed a bond in the *Engliſh* form, obliging himſelf in the ſum of 200*l. ſterling* to *James Stewart*. And the condition of the bond is, That, in caſe his Majeſty ſhould, at any time before the 3d of *Auguſt* next, grant a warrant for paſſing his moſt gracious and full pardon to Sir *James*, of all crimes and miſde-

meanors

meanors, and other offences whatſomever againſt the laws of the realm, or any of them by him heretofore committed; and that, within 20 days after ſuch warrant happens to be granted, Sir *James* ſhould pay to the ſaid *James Stewart*, his heirs or aſſigns, the ſum of 100*l. ſterling*; then the obligation to be void, otherwiſe to ſtand in full force.

His Majeſty, on the 12th of *May* 1731, granted warrant for his gracious and free pardon to the ſaid Sir *James* of the killing of Captain *Moodie*, and of all acceſſion thereto.

After the death of theſe parties, *Archibald Stewart*, as executor to the ſaid *James Stewart*, brought an action againſt the Earl of *Galloway*, as repreſenting the ſaid Sir *James*, for payment of the ſums contained in the ſaid bond.

*Pleaded* for the Earl, That the condition of the bond never exiſted; for no full pardon was granted Sir *James Stewart* of all crimes and miſdemeanors, but only a particular one for the murder of Captain *Moodie*.

*Obſerved* on the bench, That the bond was *contra bonos mores*, as it was a ſtipulation of a ſum of money for obtaining a pardon, which was truly no other than a bribe; and therefore no action could lie on the bond.

" The Lords found, That, in regard no full pardon was granted to the " deceas'd Sir *James Stewart* of all crimes and miſdemeanors, no " action lay for the ſums contained in the bond; and alſo found, that " no action could lie againſt the Earl of *Galloway* upon the bond in " queſtion." B.

Act. *Ro. Craigie.* Alt. *Elliot.* Clerk *Pringle.*

N° X. 9th *June* 1752.

Mr. *ROBERT BLACKWOOD* of *Pitreavie* Advocate,

againſt

The Creditors of the deceas'd Sir *ROBERT MILN* of *Barnton*, and of Sir *GEORGE HAMILTON* of *Tulliallan*, and of Sir *ARCHIBALD FLEMING* of *Farm*.

IN 1683, *Richard* Lord *Maitland* granted an infeftment of annualrent upon the eſtate of *Didhope*, correſponding to the principal ſum of 11,000 *l. Scots*, in favours of Sir *Robert Miln* of *Barnton*.

There having been ſundry tranſactions betwixt the ſaid Sir *Robert Miln* and Sir *George Hamilton*, in 1697, they entered into a ſubmiſſion; and, by decreet-arbitral, Sir *Robert* was found debitor to Sir *George* in a conſiderable ſum, and was decerned to pay the ſame, or to aſſign debts to the extent. In impliment of this decreet-arbitral, Sir *Robert* conveyed ſundry debts and ſubjects to Sir *George*, and, amongſt others, the ſaid infeftment of annualrent upon the lands of *Didhope*.

In 1699, Sir *George Hamilton* conveyed the ſaid infeftment of annualrent, together with other ſubjects, in favour of certain of his creditors; but, as the ſubjects conveyed exceeded the debts, the creditors were taken bound to be accountable for any ſurplus that ſhould be intromitted with by them, or to retroceſs Sir *George* after they had received payment of their debts. And, in 1709, theſe creditors were infeft in the ſaid annualrent.

Sir

Sir *Archibald Fleming* of *Farm*, ſon-in-law to Sir *George Hamilton*, being engaged as cautioner for him in ſundry debts, obtained for his ſecurity from Sir *George*, in 1702, an heretable bond of relief, and a diſpoſition of the eſtate of *Tulliallan*, and of the foreſaid infeftment of annualrent upon the lands of *Didhope*. Upon this right, Sir *Archibald* expede his infeftment in the lands of *Tulliallan* ſaid year 1702. and in the ſaid annualrent in 1706. The inſtrument of ſeiſin upon the annualrent, in a few days after its date, was brought to the general regiſter of ſeiſins to be recorded. But it ſo happened, that Sir *Archibald*, or his doers neglected to get it back from the keeper of the regiſter,

In 1704 the ſaid Sir *George Hamilton* granted bond to Sir *Robert Blackwood*, for the ſum of 7500*l. Scots*, and, for his further ſecurity, conveyed to him certain debts due to Sir *George*; and, in 1705, the ſaid Sir *George*, and Sir *Archibald Fleming* granted another bond to Sir *Robert*, narrating the former, and obliging themſelves to pay the ſums therein contained.

Upon this laſt mentioned bond, in 1716, Mr. *Robert Blackwood*, ſon to the ſaid Sir *Robert*, obtained a decreet of conſtitution againſt Sir *William Fleming*, apparent heir to the ſaid Sir *Archibald* his father; and, upon a ſpecial charge to enter heir, adjudged from Sir *William* the foreſaid heritable bond of relief and diſpoſition, granted by Sir *George Hamilton* to Sir *Archibald Fleming*; and, upon this adjudication, Mr. *Blackwood* expede a charter under the great ſeal in 1718, and was thereupon infeft in the lands of *Tulliallan*, and ſuch other ſubjects, contained in his adjudication, as held of the crown.

In 1734, a ranking and ſale of the lands of *Didhope* was brought, at the inſtance of a creditor of *Richard* Lord *Maitland*; in which proceſs, compearance was made for the creditors of Sir *George Hamilton*, as having right to the foreſaid infeftment of annualrent by the deed 1699 and infeftment thereon in 1709; and for Mr. *Blackwood*, as having right thereto in virtue of the conveyance thereof by Sir *George* to Sir *Archibald Fleming* in 1702, and of Mr. *Blackwood*'s adjudication thereof above-mentioned. And as, by reaſon of the ſeaſins being neglected to be taken back from the recorders, as above-mentioned, it was not then known that Sir *Archibald* had been infeft in the ſaid annualrent right in 1706, Sir *George Hamilton*'s creditors were preferred by virtue of their infeftment in 1709; and, as their debts exceeded the value of the ſubject, no other creditor was ranked thereon: The decreet of ranking was extracted in 1743, and the lands of *Didhope* ſold.

After this, Mr. *Blackwood* diſcovered in the regiſter, Sir *Archibald Fleming*'s ſeiſin of the foreſaid annualrent out of *Didhope*, taken in 1706, and brought a proceſs of reduction of the decreet of ranking, the price of the lands being ſtill *in medio*, and objected to the proceſs of ranking, that it had been raiſed in the name of a perſon who was dead before raiſing thereof. " The Lords, 3d *January* 1749, ſuſtained the reaſons " of reduction ſo far as to intitle Mr. *Blackwood* to be heard to diſpute upon " his infeftment, notwithſtanding of the extracted decreet of ranking, and " his compearing and competing therein."

Mr. *Blackwood* being thus admitted, ſeveral particular objections were made to the preference claimed by him. And, 1*ſt*, it was objected by the creditors of Sir *Robert Miln*, That, in the year 1697, Sir *Robert Miln* granted thirteen ſeparate conveyances of his land eſtate and heritable debts, and a general diſpoſition of his whole perſonal eſtate in favours of Sir

*George Hamilton*: that theſe were equal to a diſpoſition *omnium bonorum*; and, as Sir *Robert* was thereby rendered inſolvent, theſe conveyances, (and particularly this conveyance of the annualrent right) were reduceable at the inſtance of his prior creditors, at common law, independent of the ſtatute 1621, unleſs Mr. *Blackwood* (who derives right to the ſaid infeftment of annualrent through Sir *George Hamilton*) will prove that Sir *Robert* had other funds ſufficient to ſatisfy his creditors.

*Anſwered* for Mr. *Blackwood*, That he is not obliged, after ſo great a lapſe of time, to bring a proof of Sir *Robert Miln*'s ſolvency, or ſeparate funds.

2dly, The conveyances were not voluntary, but in implement of a decreet-arbitral.

" The Lords repelled the objection."

*Thomas Boyes* and *Dowglas* of *Garvat*, creditors of Sir *Archibald Fleming*, objected to the preference claimed by Mr. *Blackwood*, that, as Sir *George Hamilton* was the debtor, in the original bond, to Sir *Robert Blackwood*, and that Sir *Archibald Fleming* became bound in a bond of corroboration, it was evident Sir *Archibald* was only cautioner, and therefore free, by the ſeptennial preſcription, introduced by the 5th act of Parl. 1695.

*Anſwered*, That the ſtatute is a correctory law, and therefore ought to be, and always has been, ſtrictly interpreted, and has not been extended beyond the words thereof; and the preſent obligation does not fall under the words of it; for there is no clauſe of relief in the bond, nor bond of relief intimated to the creditor at receiving of the bond; but both obligants are bound conjunctly and ſeverally, and are equally principal debtors.

" The Lords repelled the objection."

The ſaid *Thomas Boyes* and *Douglas* of *Garvat* next inſiſted, That tho' Sir *Archibald Fleming* was not found intitled to the benefit of the ſeptennial preſcription; yet it was evident, Sir *George Hamilton* was the original debtor to Sir *Robert Blackwood*; and that Sir *Archibald*, who became bound in the bond of corroboration, was only cautioner; and therefore would have been intitled, in point of right, upon payment of the debt, to have demanded a conveyance from Mr. *Blackwood*, of the debts aſſigned by Sir *George* to Sir *Robert Blackwood*, in ſecurity of the debt due to Sir *Robert*: from which it follows, that the diligence againſt Sir *Archibald*'s eſtate, cannot be carried into execution, to his creditor's prejudice, unleſs Mr. *Blackwood* aſſigned to them the collateral ſecurities, granted by Sir *George*, to Sir *Robert Blackwood*.

*Anſwered* for Mr. *Blackwood*, That cautioners are intitled to demand from the creditor, an aſſignation to collateral ſecurities, upon this principle, that cautioners are only *ſubſidiarie* liable, after the principal debtor and his eſtate are diſcuſſed: and therefore the creditor cannot, to the cautioner's prejudice, give up any ſecurity he has on the debtor's eſtate. But the caſe is different, with reſpect to co-obligants, who are bound conjunctly and ſeverally, as Sir *George* and Sir *Archibald* are; for both of them are conſidered as principal debtors, and have not the benefit of diſcuſſion.

" The Lords found it competent to *Thomas Boyes* and *Dowglas* of *Gar-*
" *vat*, as creditors to Sir *Archibald Fleming*, to inſiſt, that if Mr. *Black-*
" *wood* ſhould recover payment out of the annualrent-right: he
" ought

" ought to convey to them any collateral ſecurities which were given " to Sir *Robert Blackwood*, by Sir *George Hamilton*."

The ſaid *Thomas Boyes*, as creditor to Sir *George Hamilton* and Sir *Archibald Fleming*, claimed to be preferred to Mr. *Blackwood*, upon the ſaid annualrent-right, for the following reaſons, *viz.* That he had, upon Sir *George* and Sir *Archibald*'s joint bond, led an adjudication againſt them in 1709, particularly adjudging from Sir *Archibald*, the diſpoſition of relief, granted by Sir *George* to him: and, upon this adjudication, Mr. *Boyes* expede a charter in 1747, and was infeft in the ſaid annualrent: and, as his adjudication was long prior to Mr. *Blackwood*'s, he inſiſted to be preferred; and alſo objected, that Mr. *Blackwood*'s adjudication was void and null, as it proceeded upon a ſpecial charge againſt Sir *William Fleming*, to enter heir to his father Sir *Archibald*. And in the ſpecial charge, neither the ſaid annual rent, nor the lands are contained; but the letters of ſpecial charge ſtill remain blank: alſo Mr. *Blackwood*'s charter of adjudication was void, becauſe it is from the Crown, tho' the annualrent holds of a ſubject, and the ſeiſin thereon was void, becauſe not taken on the lands of *Didkope*, out of which the annualrent is upliftable, but is taken upon the lands of *Tulliallan*, with which this annualrent has not the leaſt connection.

Mr. *Blackwood* made no anſwer to theſe objections; but alledged, That Mr. *Boyes*'s adjudication did not carry the ſaid annualrent-right; for the adjudication is led both againſt Sir *George Hamilton* and Sir *Archibald Fleming*, and adjudges both their eſtates ſeparately, and adjudges this annualrent as belonging to Sir *George*; and then it proceeds to adjudge ſeveral lands and ſubjects belonging to Sir *Archibald*; and, among others, " an " heritable bond, diſpoſition, or other right of relief, of what debts he " ſtood bound for the ſaid Sir *George*, upon the foreſaid lands and barony " of *Tulliallan*." Then there follows the uſual general clauſe: " Toge- " ther with all and ſundry reverſions, bonds, *&c.* and all other rights, *&c.* " made and granted in favours of the ſaid Sir *George* and Sir *Archibald*, of " and concerning the lands, baronies, *&c.*" above mentioned, " and any an- " nualrent or yearly duty to be uplifted forth of the ſame." And Mr. *Blackwood* contended, that the bond of relief adjudged from Sir *Archibald* is ſpecially limited to be upon the lands of *Tulliallan*; and that the general clauſe could not be ſo explained, as to carry ſubjects as belonging to Sir *Archibald*, which, by former clauſes, were deſcribed as belonging to Sir *George*; but muſt be explained *applicando ſingula ſingulis*, to adjudge from Sir *George* all right competent to him, of and concerning the ſubjects ſpecially adjudged from him, and the ſame way with regard to Sir *Archibald*.

*Anſwered* for Mr. *Boyes*, That as he was not intitled to have poſſeſſion of the diſpoſition of relief; ſo he could not deſcribe it more particularly in his adjudication. But the deſcription is ſufficient, both to ſhow the intention of the creditor to adjudge this right of relief, and alſo to diſtinguiſh it ſufficiently from the other parts of Sir *Archibald*'s eſtate; and as the annualrent-right is mentioned in the libel, and all right competent to Sir *George*, or to Sir *Archibald*, in the lands, *&c.* above mentioned is adjudged, that was ſufficient to carry the ſaid annualrent-right either from Sir *George* or Sir *Archibald*.

" The Lords repelled the objection made by Mr. *Blackwood* to Mr. " *Boyes*'s adjudication; and found, that the ſaid annualrent-right was " thereby adjudged, as well from Sir *Archibald Fleming*, as from Sir

*George*

" *George Hamilton*; and ſuſtained the objection made by Mr. *Boyes*
" to Mr. *Blackwood*'s adjudication, and to the charter and ſeiſin fol-
" lowing thereon; and found the ſaid adjudication, charter and ſei-
" ſin void and null."

It was objected, by ſome of Sir *George Hamilton*'s creditors, to the preference claimed by Mr. *Blackwood*, That the conveyance of the annualrent upon *Didhope* by Sir *George Hamilton* to Sir *Archibald Fleming*, was *ſpreta inhibitione*; *Robert Allan*, *Grizel Stewart*, and *Robert Haliburton*, having, in *February* 1698, duly executed and regiſtrate inhibitions againſt Sir *George*.

Mr. *Blackwood* made anſwer to this, by objecting to the inhibitions. And, 1*ſt*, he objected, That *Allan*'s inhibition is executed upon the 5th *February* 1698, againſt Sir *George*, at his dwelling-houſe in *Edinburgh*, by affixing a copy upon the moſt patent door, *&c.*; and *Haliburton*'s inhibition is executed on the ſame day againſt him, as forth of the kingdom, at the mercat-croſs of *Edinburgh*, pier and ſhore of *Leith*; and, as he could not be in the kingdom and out of it at the ſame time, one of the executions behoved to be null.

To this it was anſwered, 1*ſt*, That he might, on the ſame day, be both in the kingdom and out of it; ſo that both executions might be good, ſuppoſing them to be executed at different times of the day.

2*dly*, The two executions cannot be ſet up in oppoſition to one another: each creditor ſtands on his own ground; and Mr. *Blackwood* muſt chuſe which execution he will object to, and prove his objection.

" The Lords repelled this objection to the executions; but reſerved to
" Mr. *Blackwood* to diſprove either of theſe executions, as he ſhould
" be adviſed."

Mr. *Blackwood* next objected to *Grizel Stewart*'s and *Robert Haliburton*'s inhibitions, That the executions were wrote upon a paper part, and neither ſpecified the debts upon which the inhibitions were raiſed, nor the date of the letters thereby intended to be executed, ſo that theſe executions would apply to any debt, due by Sir *George Hamilton* to theſe creditors; and, as inhibitions are intended to interpel the lieges from having any dealings with the debtor, in prejudice of that particular debt, it ought therefore to appear with certainty, upon what debt the inhibition proceeded, and not to be in the power of a creditor to apply the execution of an inhibition to any debt, or any letters he ſhall think proper.

*Anſwered* for the inhibitors, That there was no law requiring the executions of inhibitions, to ſpecify either the debt itſelf, or the date of the letters; and, as theſe ~~objections~~ behoved to be regiſtred within forty days, alongſt with the letters, there was no hazard of applying the execution of one inhibition to another.

Execut.mo

" The Lords repelled the objection."

It was further objected to theſe two inhibitions, That the executions againſt the lieges were only at the mercat croſs of *Edinburgh*, whereas, ſuppoſing Sir *George* to have been out of the kingdom, they ought to have been at the mercat croſs of *Edinburgh*, pier and ſhore of *Leith*.

To this it was anſwered, That, as the lieges are conſidered to be in the kingdom, ſo there is no neceſſity to interpel them by an execution at the mercat croſs, pier, and ſhore; but the execution at the mercat croſs of the head burgh of the jurisdiction, where the debtor's principal dwelling houſe is ſituate, is preſumed ſufficient notification to them.

" The

" The Lords repelled the objection."

It was further objected to the executions of all the inhibitions, That they did not bear that copies of the executions were left with, and for the party, and the lieges; but only that copies of the letters were left.

" The Lords repelled the objection."

Laſtly, it was objected, That all action or ground of challenge upon the inhibitions for reducing the ſecurity granted by Sir *George Hamilton* to Sir *Archibald Fleming* in 1702, was barred by the negative preſcription; no ſuch action having been intented, or challenge made within 40 years of the date of the deed, nor even within 40 years of the time when the creditors behoved to be in the full knowledge thereof; for the deed, and infeftment thereon, in the lands of *Tulliallan*, were produced in a ranking and ſale of that eſtate in 1708; alſo Sir *Archibald*'s infeftment in this annualrent, taken in 1706, being upon record, the inhibiters cannot plead ignorance in bar of the preſcription, ſeeing they might have known of the infeftment by ſearching the regiſters.

*Anſwered* for the Inhibiters, That only ſuch deeds are reduceable *ex capite inhibitionis*, as are to the prejudice of the inhibiter; and therefore, tho' a debtor inhibited ſhould grant twenty perſonal bonds, and as many diſpoſitions, yet the inhibiter is not ſuppoſed to know of them; and tho' he ſhould, he has no intereſt to reduce them, becauſe they are not to his prejudice. Therefore, in this caſe, the preſcription could only run from 1706, the date of the infeftment; and this action was commenced in 1744, *i. e.* two years within the years of preſcription.

2*dly*, As Mr. *Blackwood* was ignorant of the ſeiſin, which was his own evident, and pleaded on it after the decreet of ranking was extracted as *inſtrumentum noviter veniens ad notitiam*, ſurely the inhibiters are intitled to plead the ſame ignorance againſt this ſeiſin, which now, for the firſt time, is founded on, to their prejudice.

3*dly*, This proceſs is a reduction brought by Mr. *Blackwood* of the decreet of ranking, and the interlocutors pronounced in favours of the defenders againſt the purſuer in the ranking and ſale that was brought in 1734; and, as he is reponed againſt the judgment pronounced in that proceſs, all things muſt be reſtored on both ſides, and the preſent competition falls to be determined as it ought to have been in 1734; at which time it was not 40 years from the date of the inhibitions themſelves.

" The Lords repelled the objection of preſcription." B.

For Mr. *Blackwood*, *Lockhart*. For the other Creditors, *Ro. Craigie*. Reporter, Lord *Elchies*. Clerk *Kirkpatrick*.

N° XI. 11th *June* 1752.

*WALTER STIRLING*, Doctor of Medicine,

againſt

*JOHN FINLAYSON*, Commiſſary of *Dumblane*.

DR. *Stirling* is proprietor of a tenement on the north ſide of the high-ſtreet of *Stirling*; and Commiſſary *Finlayſon* is proprietor of a tenement adjoining to the eaſt gavel of the Doctor's tenement.

In 1671, the Doctor's tenement was repaired, and the fore-wall brought

eight feet forward towards the ſtreet; and that addition to the tenement was finiſhed in the manner of a tympany or ſtorm-gavel. At this time, there was lying, to the fore-wall of the Commiſſary's tenement, a fore-ſhot, which came eight inches farther forward than the new front of the Doctor's tenement; and the drop fell from the roof of the Doctor's ſtorm-gavel, upon this fore-ſhot.

Commiſſary *Finlayſon*'s tenement being in diſrepair, he took it down, and rebuilt it on the foundation of his old tenement and fore-ſhot; and raiſed this new tenement ſome feet above the Doctor's; ſo that the falling of the drop was interrupted. Upon this, the Doctor applied to the Sheriff of *Stirling*, ſetting furth, that he and his authors had acquired a ſervitude, or *jus ſtillicidii recipiendi*, over the Commiſſary's tenement, by their drop falling thereon, beyond the years of preſcription; and craving, that the falling of his drop might not be interrupted. The Sheriff allowed a proof of the poſſeſſion of the drop; which being clearly proved for upwards of ſixty years, the Sheriff found, that the Doctor had acquired a right of ſervitude over the Commiſſary's tenement; and ordained the drop to be carried off in a lead ſpout to be fixed on the Commiſſary's wall; and ordained the ſpout to be fixed and maintained at the Commiſſary's expence.

At the ſame time, the Commiſſary having declined the juriſdiction of the Sheriff, he applied to the magiſtrates, craving that an inqueſt might be appointed for cognoſcing the matter. Accordingly an inqueſt was appointed; who, without determining the right of ſervitude, ordained the ſpout for carrying off the drop, to be fixed betwixt the two tenements, at the joint expence of both parties, of the form and dimenſions deſcribed in the verdict.

Theſe ſentences came before the Lords by mutual ſuſpenſions; and the Commiſſary admitted, that the drop had fallen from the roof of the Doctor's tenement, upon the Commiſſary's fore-ſhot, paſt memory; and alſo admitted, that with reſpect to houſes without the limits of a burgh, the ſervitude, or *jus ſtillicidii recipiendi*, would have been thereby conſtituted; but contended, that within burgh, there were not *termini habiles* for acquiring ſuch ſervitude by preſcription, becauſe buildings within burghs are regulated by the particular conſtitutions and policy of the burgh; and if a houſe be built according to theſe rules, the proprietors of the neighbouring tenements cannot complain of any diſadvantage thence ariſing to their property. And as the building of a houſe with a ſtorm-gavel is a lawful manner of building, the Commiſſary and his authors could not complain, tho' the drop was thereby made to fall on their tenement; and, conſequently, a ſervitude could not be acquired by a poſſeſſion which they could not otherwiſe interrupt, than by raiſing their tenement, which they were not obliged to do till they thought proper.

*Anſwered* for the Doctor, That the ſervitude *ſtillicidii recipiendi*, is one of the poſitive ſervitudes, conſiſting in *patiendo*, to wit, in ſuffering the falling of a drop from the roof of the dominant, upon the ſervient tenement; and if it ſo fall during the years of preſcription without interruption, a ſervitude muſt be thereby conſtitute. The diſtinction betwixt houſes without, and thoſe within the limits of a burgh, is without foundation; no ſuch diſtinction being made either in the civil or our municipal law: neither is there any foundation for it from the conſtitution and policy of burghs; for it cannot be admitted, that, by the conſti-

tution

tution of any burgh, it is lawful for the proprietor of one tenement to throw his drop upon the area or tenement belonging to another, unleſs he has a right of ſervitude for that purpoſe: on the contrary, it is regulated by the policy of all boroughs of *Scotland*, that every proprietor, who builds a tenement, ſhall leave a certain ſpace of his own property free for receiving the eaſing-drop. It is true, that, betwixt tenements which face the high ſtreet, as theſe in queſtion do, there is ordinarily no ſpace left; but it will not from thence follow, that the proprietor of one of theſe tenements can, without a right of ſervitude, throw his drop upon the adjacent tenement; for, as theſe houſes are generally built with erect gavels, the drop of each tenement naturally falls over the fore and back walls thereof. It is, however, no doubt, lawful, and often practiſed, to raiſe the fore-walls into tympanies or ſtorm-gavels; but it is not lawful, without a right of ſervitude, to finiſh theſe tympanies ſo as to make the drop fall upon the adjacent tenement; and therefore they are ordinarily built, ſo as not to reach ſo far as the principal gavels of the houſe, and thereby the drop ſtill falls over the fore-walls of the houſe upon the ſtreet, or upon the proprietor's own area. And if one ſhould built his ſtorm-gavel ſo as to throw the drop upon his neighbour's property, his neighbour, no doubt, would have right to ſtop him: but if the drop continues to fall during the years of preſcription, a ſervitude is thereby conſtituted.

The Lords were of opinion, That there was no ſervitude acquired in this caſe; but did not expreſsly determine that point. Only, as a conſequence thereof,

"They found, That the drop ought to be carried off by a lead ſpout to "be fixed betwixt the tenements; and ordained the ſpout to be fixed "and maintained at the joint expences of the proprietors of the two "tenements; but varied the form and dimenſions which had been "appointed by the verdict." B

For *Stirling*, *And. Pringle* and *Bruce*. For *Finlayſon*, *Haldane* and *Jo. Grant*. Clerk *Kirkpatrick*.

N° XII. 12th *June* 1752.

*CHARLES, ELIZABETH*, and *JEAN OUCHTERLONIES*,

againſt

*GILBERT OUCHTERLONY* of *Pitforthie*.

*Alexander Ouchterlony*, father to the purſuers and defender, by his contract of marriage with *Elizabeth Tyrie*, obliged himſelf, his heirs, *&c.* "to provide and have in readineſs, againſt the term of *Martinmas* "next (1722) the ſum of 6000 merks *Scots*; which, with 2000 merks "money foreſaid of tocher to be paid to the ſaid *Alexander* by *David Tyrie* "the bride's father, the ſaid *Alexander Ouchterlony* binds and obliges him, "and his foreſaids, to employ upon land or bond, and to infeft and ſecure "himſelf, and his ſaid future ſpouſe in liferent, in 6000 merks; and the "children to be procreate of the marriage, in fee of the haill 8000 merks; "and how oft the ſaid ſum ſhall be uplifted, to re-employ it in the ſame "manner." And, by another clauſe of the contract, it is declared, "that,

"in

" in caſe the ſaid *Alexander Ouchterlony* ſhall predeceaſe his future ſpouſe, " leaving children behind him in life, one or more without providing " them in part or pertinences, then, and in that caſe, *David Ouchterlony*, " brother to the ſaid *Alexander*, and the ſaid *David Tyrie*, or their heirs, " ſhall divide to the children, one or more, the foreſaid 8000 merks, or " what fund may be free, conform to their diſcretion."

After the date of this contract, *Alexander Ouchterlony* purchaſed a land eſtate of the value of 30,000 merks *Scots*, and took the rights thereof, in favours of himſelf in life-rent, and of *Gilbert Ouchterlony*, the eldeſt ſon of the marriage, in fee; but reſerved power to burden the ſaid lands with ſuch ſums of money as he ſhould think proper, for proviſions to his younger children; and with the ſum of 11,000 merks, to be employed by him for any uſe and purpoſe he ſhould think fit.

After this he contracted debts, to the value of the 11,000 merks, and predeceas'd his ſpouſe in 1736, leaving the ſaid *Gilbert Ouchterlony*, his eldeſt ſon, and ſix younger children, but without making any proviſion in favours of the younger children.

In 1749, *David Tyrie*, the grand-father, obſerving the power of dividing the 8000 merks amongſt the children veſted in him, and *David Ouchterlony*, and their heirs by the contract of marriage, he apply'd to *Patrick Ouchterlony* ſon to *David*, *David* being dead, and they, by a writing under their hands, dated 8th *July* 1749, allotted the ſum of 1160 merks to *Gilbert Ouchterlony*, and the ſum of 1140 merks to each of the ſix younger children, making in all 8000 merks, with annualrent from the term of *Whitſunday* 1736, being the firſt term after *Alexander Ouchterlony*'s deceaſe, but with deduction of a proportional part of the liferent provided to their mother by the contract of marriage.

As *Gilbert Ouchterlony* refuſed to pay the ſums allotted to the younger children, three of them who were in the country, the other three being abroad, brought a proceſs againſt him for payment.

*Pleaded* for the defender, That the right which the children have upon the contract of marriage, does not make them properly creditors; it is merely an obligation of ſucceſſion, which imports no more than that they ſhall ſucceed to 8000 merks, if the father leave as much free gear: this is the legal interpretation of ſuch clauſes; and, in the preſent caſe, is ſo explained by the contract; for the power of diviſion given to the friends is, " to divide to the " children, one or more, the foreſaid 8000 merks, *or what fund may be* " *free.*" But here, there was no fund free at *Alexander Ouchterlony*'s death, and therefore, the friends had no ſubject which they could divide; for the eſtate, given to the defender by his father, was not a free ſubject, affectable with theſe proviſions; ſeeing the father, when he purchaſed the eſtate for his ſon, reſerved to himſelf a faculty of burdening the eſtate to the extent of 11,000 merks, which was more than ſufficient for ſatisfying the proviſions to the younger children; and his afterwards contracting debt to the extent of 11,000 merks, cannot intitle the children to come againſt the eldeſt ſon, no more than if he had actually lent out the 8000 merks, in terms of the contract, and afterwards contracted debt to the extent thereof; ſuch contractions could not prejudge the eldeſt ſon, becauſe contracted poſterior to the date of his right, and, altho' they would have affected the 8000 merks becauſe the father remained fiar, yet that would not have intitled the younger children to recourſe againſt their elder brother. A proviſion in a contract of marriage, of a certain ſum in favours

vours of the children, cannot debar the father from making a rational ſettlement on his eldeſt ſon, or even, from making a pure donation, when he reſerves a fund more than ſufficient for ſatisfying the obligation; for ſuch a donation would not be reduceable at the inſtance of creditors, on the act 1621, as the granter did not thereby become inſolvent, and as the fee was never in the father, this ſettlement cannot be conſidered as *præceptio hæreditatis*, eſpecially, when the queſtion is not with proper creditors, in whoſe favours only that paſſive title was introduced.

2*dly*, Suppoſing there had been a free fund, yet the ſums allocated to the younger children ought not to bear intereſt, till the time the diviſion was actually made; for the 8000 merks, provided in the contract of marriage, does not bear intereſt, ſeeing it was not laid out upon a bond bearing annualrent, nor is there any time ſpecified in the contract for laying it out.

*Anſwered* for the Purſuers, That the proviſions in their father's contract of marriage, in their favours, cannot be diſappointed by any gratuitous deed of their father's; and the diſpoſition, in favours of the eldeſt ſon, is confeſſedly a gratuitous deed, and therefore can afford no defence againſt their claiming theſe proviſions. Nor does it alter the caſe, that the father reſerved power to burden the eſtate with 11,000 merks, and contracted debt to that extent; for even the ſuppoſed caſe of his laying out 8000 merks, in terms of the contract, and afterwards ſpending that ſum, would not have barred the younger children from claiming their proviſions from their father's repreſentatives; for the obligation in the contract was not merely to lay out a ſum in theſe terms, but to make the ſame effectual to the children; and that the defender does repreſent his father is evident; for a gratuitous ſettlement by a father, of the fee of an eſtate upon his eldeſt ſon, does not make that ſon a ſingular ſucceſſor, but he is at leaſt liable, *in valorem* of the eſtate, to fulfil all his father's obligations contracted prior to the date of his right. And the preſent claim is further ſupported by the ſettlement of the eſtate on the defender; for the father thereby reſerves power to burden the lands with proviſions to his younger children, and the antecedent obligation ought to have the benefit of this faculty, as it has often been found, that lands, diſponed with a power to contract debts, are equally affectable by debts contracted prior to the diſpoſition, as with thoſe contracted after it.

With reſpect to the annualrent, anſwered, That, by the contract of marriage, the father was bound to lay out upon land or bond, in reſponſal men's hands, 8000 merks, and to ſecure his ſpouſe in the life-rent of 6000 merks thereof, and the children in the fee of the whole; and to re-employ this ſum ſo oft as it ſhould happen to be uplifted: which plainly imply'd, that the ſum was not to be a dead ſtock, but to be laid out as a fund yielding rent or annualrent, to which the children are intitled from the diſſolution of the marriage, ſubject to the life-rent provided to their mother; and therefore, it is not the deed of diviſion, but the contract that intitles them to the annualrent from the diſſolution of the marriage.

" The Lords found, That *David Tyrie* and *Patrick Ouchterlony* had " power to make a diviſion of the 8000 merks, provided by the " contract of marriage to the children of the marriage; and that " the defender was liable to the purſuers, each of them for their " own parts, as ſettled by the deed of diviſion libelled on." B

Act. *Scrymgeour*. Alt. *Henry Home*. Clerk *Gibſone*.

N° XIII. 12th *June* 1752.

## *LANDALES*
against
## *LANDALE.*

*ANdrew Landale* was infeft in the lands of *Burns*, holding ward of *Gibſon* of *Durie*; he had one ſon *David*, whoſe children were *Andrew*, *Anne* and *Margaret* of one marriage, and *Thomas* of another.

*Andrew* the firſt, in the year 1686 executed a diſpoſition, containing procuratory and precept in favor of his ſon *David*: after the death of *Andrew* the firſt, his ſon *David* entered to the poſſeſſion of the lands of *Burns*; yet neither did he make up titles as heir of his father, nor did he execute the procuratory in the diſpoſition 1686.

In the 1719, *Durie* the ſuperior granted a charter to *David*, by which the lands of *Burns* were diſponed in liferent to *David*, and in fee to his eldeſt ſon *Andrew* the ſecond, and to his heirs and aſſigns, the power of altering being reſerved to *David*. This charter contained a *novodamus*, and by it the holding was changed from ward into feu: on it ſeiſin followed, which narrated that *David* appeared perſonally, holding in his hands the precept contained in the ſaid charter.

In the 1726, *Andrew* the ſecond conveyed, as fiar, the lands of *Burns* to his ſiſters of full blood, *Anne* and *Margaret*, reſerving to himſelf his own liferent, and a power of altering: this diſpoſition was purified by his deceaſe.

*David*, his father, ſurvived him for many years, and continued in poſſeſſion of the lands in conſequence of his reſerved liferent: after the death of *David*, *Thomas*, brother conſanguinean of *Andrew* the ſecond, entered to the poſſeſſion of the lands of *Burns*; and *Anne* and *Margaret* having, in right of the diſpoſition 1726, brought a proceſs of removing againſt him, he was ſerved heir to his grandfather *Andrew* the firſt, as the laſt perſon regularly infeft in the eſtate, and raiſed a reduction of the charter 1719, and of the diſpoſition 1726: the cauſe thus reſolved into a competition of right.

In this caſe the queſtion was, 1*mo*, whether by the charter 1719 a proper feudal right was eſtabliſhed in the perſon of *Andrew*. 2*do*, Suppoſing the charter 1719 to be informal, whether it might not at leaſt have the effect of conveying to *Andrew* the perſonal right to the diſpoſition 1686, which was in *David*.

*Pleaded* on the firſt point for *Anne* and *Margaret Landales*, By the original conſtitution of feudal holdings no part of the property was made over to the vaſſal, but as the rigour of the feudal law began to abate, and lands came gradually to be *in commercio*, a certain right of property was underſtood to be in him: although the ancient feudal eſtabliſhment between ſuperior and vaſſal has in many particulars been changed, yet the forms, originally uſed in the inveſtiture of the heir, ſtill continue, and theſe forms ſuppoſe the right of property to be in the ſuperior; when therefore any diſputes ariſe with relation to the making up of titles in the perſon of an heir, they muſt be determined by the principle on which the form is founded, namely, that the ſuperior is proprietor, and that the property is derived from him to the heir of the vaſſal.

That, in the form of inveſting the heir, the ſuperior is underſtood to have the full property in him, appears from the following conſiderations.

1*mo*,

1*mo*, It is a principle in the laws of all civilized nations, that delivery can avail nothing in the tranſmiſſion of property, unleſs it be made by the proprietor himſelf, or by his order: now with us delivery is made to the heir by the ſuperior, and it is his bailie, who, by his command, gives the infeftment: therefore, in granting a precept of *clare conſtat*, the ſuperior is underſtood to act as proprietor; agreeably to this principle, in *England*, lands veſt in the heir *ſolâ exiſtentiâ*: in *Scotland*, delivery is required: the reaſon of the difference is, that *there* the property is underſtood to be derived to the heir from the deceas'd vaſſal, *here* from the ſuperior.

2*do*, With us, if an heir renounces, and thereby gives up his claim to an inveſtiture from the ſuperior, the ſuperior may diſpoſe of the fee as to him ſeems good: this proves, that, in queſtions between the ſuperior and the heir of the vaſſal, the full right is underſtood to be in the ſuperior, under the obligation of inveſting the heir, if he ſhould inſiſt for an inveſtiture; for it is an undoubted principle in law, that a renunciation may disburden, but cannot convey property.

As therefore, in all queſtions concerning the form of making up titles to lands by an heir, the ſuperior is conſidered as full proprietor, ſubjected only to the obligation of renewing the feu in favor of the heir, it follows that a charter (as in this caſe) granted by the ſuperior with conſent of the heir (who is creditor in this obligation) to a third party, muſt be effectual in law, and that a proper feudal right was eſtabliſhed in the perſon of *Andrew* by the charter 1719; for a reſignation, made by the heir, cannot be more effectual than a formal conſent, nor a formal conſent than one proved *rebus et factis*.

*Pleaded* on the firſt point for *Thomas Landale*: The eſtabliſhment and the tranſmiſſion of property have in our law received certain forms, and theſe may not be varied according to the caprice of parties, nor ſupplied by any ſuppoſed equivalent. In deeds *inter vivos*, the rule obtains, *quod traditionibus, non nudis pactis dominia transferuntur*: in ſuch caſes, therefore, a tradition, either real or ſymbolical, is required: in the tranſmiſſion from the dead to the living, the ſame principle obtains, and *Nulla ſaſina, nulla terra*, is the maxim of our law. As therefore with us there can be no compleat feudal right without infeftment, (which is the delivery of poſſeſſion), and as it neceſſarily ceaſes at the death of the perſon infeft, it muſt be renewed in the perſon of the heir.

The forms requiſite in the conſtitution or tranſmiſſion of property are in their nature indifferent, in their original, arbitrary, but as eſtabliſhed by law, abſolutely eſſential. If they are obſerved, the right of property may be conſtituted or tranſmitted: if they are neglected, the right remains *in haereditate* of the laſt perſon regularly infeft, and may be taken up by the next heir. Whether theſe principles be agreeable to the antient principles of the feudal law or not, is a matter of ſmall moment; for expediency introduced them, and practice has demonſtrated their utility.

When the vaſſal is regularly infeft, the property remains in him until he be diveſted of it in ſuch manner as is by law appointed. In order to transfer property, and to ſubſtitute a purchaſer to the full right of the vaſſal, the interpoſition of the ſuperior is required: but as he, being already diveſted of the property, could make no new grant of it, without being reinveſted in it himſelf: the law has deviſed an inſtrument of reſignation upon the procuratory granted by the vaſſal for ſurrendering the lands to the ſuperior: by means of this, the ſuperior is reinveſted in the property,

and

and may make a new grant of it when the reſignation is *in favorem*, or may conſolidate it with the ſuperiority when it is *ad remanentiam*. As the ſuperior is not reinveſted till this reſignation be made, it follows, that without it he can make no new grant of the property; and as the confeſſion of the party will not ſupply the want of an inſtrument of ſeiſin, ſo neither will it the want of an inſtrument of reſignation.

In the tranſmiſſion of feudal property from the dead to the living, our law permits not an *ipſo jure* tranſmiſſion; neither does it receive the maxim *quod mortuus ſaſit vivum*; and therefore it requires a renewal of the right in the perſon of the heir. As the ſuperior, by the original grant, became bound to receive the heir in the place of his predeceſſors, (the heir performing always the obligations preſtable by him), our law has eſtabliſhed certain rules neceſſary to be obſerved in this *renovatio feudi*. When the propinquity of the heir is notoriouſly known, and the ſuperior is willing to receive him as vaſſal, a precept of *clare conſtat* only is required, which is not a new grant, but a warrant for introducing the heir into poſſeſſion, by a renewal of the infeftment in his perſon: but, if the ſuperior refuſes to comply with this, the heir may have himſelf cognoſced as heir of the former inveſtiture, and upon that compel the ſuperior to give him the infeftment.

From theſe principles it follows, that, the right being once eſtabliſhed in the perſon of the vaſſal by charter and infeftment, the *lex inveſtituræ* may not be altered without a reſignation into the hands of the ſuperior, although both ſuperior and vaſſal ſhould conſent to it.

To apply what has been ſaid to the preſent caſe, the predeceſſors of *Durie* were long ago diveſted of the property of the lands of *Burns*: there remained only to them the caſualties of ſuperiority: by the original grant, they were bound to receive the heirs of the vaſſal, and to renew the infeftment in their perſons. *Durie* might, in the 1719, have granted a precept of *clare conſtat* to *David*, as heir of his father *Andrew* who was the perſon laſt infeft: or he might, after having been reinveſted in the property, in conſequence of the procuratory in the diſpoſition 1686, have made a new grant to *David*. *Durie* followed neither of theſe methods; but without having been reinveſted himſelf, made a new grant of property to *David* in liferent, and to his ſon *Andrew* in fee, and at the ſame time changed the nature of the holding. Thus, as the legal and indiſpenſable forms were omitted, the charter 1719 muſt prove void and ineffectual to the purpoſe of eſtabliſhing any right in *Andrew*.

To what is ſaid, that, in the form of inveſting heirs, the ſuperior is underſtood to be proprietor, it is anſwered, that, during the infancy of the feudal law, when the right given to the vaſſal was only a *jus uſusfructus*, the property of the lands neceſſarily remained with the ſuperior: and as no heritable right was created in the perſon of the heir, there could be no obligation upon the ſuperior to receive him; but when the form of theſe grants came to be varied, and rights deſcendable to heirs and affectable by creditors were eſtabliſhed, the obligation on the ſuperior to receive the heir, became the neceſſary conſequence of ſuch heritable right, and the ſuperior was thereby diveſted of the fee which was eſtabliſhed in the vaſſal.

If at the death of every vaſſal the property returned to the ſuperior, it would follow, that in ſuch caſe it might be alienated or charged with debt, nay more, that it would forfeit by the crime of the ſuperior; and the implied

plied obligation to receive the heir of the vaſſal, would only produce an action of damages againſt the ſuperior.

If the ſubvaſſal has no right of property in competition with his immediate ſuperior the Crown's vaſſal, neither has the Crown's immediate vaſſal with his ſuperior; from which it follows, that the Crown, as ultimate ſuperior, might reſume the whole lands in the nation, by refuſing to fulfil the implied obligation of a ſuperior; and this is a poſition which cannot be maintained.

*Replied* on the firſt point for *Anne* and *Margaret Landales:* In the eſtabliſhed forms of tranſmiſſion from the dead to the living, the property is ſuppoſed to be in the ſuperior, and a precept of *clare conſtat* derives its validity from that principle; but the preciſe words of a precept are by no practice made neceſſary; and it muſt be ſufficient for tranſmitting property from the dead to the living, that the ſuperior, underſtood to be proprietor, makes a conveyance *cuicunque*, with the conſent of the apparent heir, the only perſon for whoſe intereſt it may be to put a negative upon ſuch conveyance. As to the neceſſity of a reſignation, the argument uſed for *Thomas* holds in tranſmiſſions *inter vivos*, becauſe the vaſſal infeft is underſtood to be proprietor, and cannot be diveſted of the property without a formal deed, unleſs by death, which has the effect of reinveſting the ſuperior, and conſequently of making a conveyance of the property by him effectual, if it be granted with the conſent of the apparent heir.

*Pleaded* on the ſecond point for *Anne and Margaret Landales:* As the charter 1719 ſpecially narrates the diſpoſition to *David* in the 1686, containing procuratory and precept, it is evident that the parties had that deed in view when that charter was granted to *David* in liferent, and to *Andrew* his ſon in fee. Therefore, although it ſhould be found that *Durie* had no title to grant the charter 1719, yet, as it was granted with conſent of *David*, it muſt be effectual *quoad* all right that was in *David*, that is, *quoad* the diſpoſition with procuratory and precept, and this without an actual written conſent; for the legal effect of conſent depends not upon any ouvert act, but upon the act of the mind: if this act of the mind be proved to the conviction of the Judge, it matters not whether it was expreſſed in words, or *rebus et factis*.

It is true indeed, that writing is required to an actual conveyance of lands or bonds, yet no argument can from thence be drawn to this caſe of a naked conſent, a naked conſent not being equivalent to a conveyance, although it may be the foundation of an action to convey.

However this conſent of *David*, *rebus et factis*, muſt be ſufficient to validate the charter 1719, in favor of *Andrew*; for a diſpoſition of lands, *a non domino*, is good againſt every one but the real proprietor, and with his conſent againſt him alſo. Now, granting that *Durie* had no power to give the charter 1719, yet *David* was the only perſon who could diſpute its validity, and he conſented to it: the deed is therefore good in law, and ſecured from all further queſtion.

But, *ſeparatim*, granting a conſent in writing to be neceſſary, ſuch conſent was given in this caſe: for the charter 1719 bears, that *David* conſented to the change made in the holding from ward to feu, and this implies that *David* conſented alſo, that his ſon *Andrew* ſhould be taken into the right; nor is it any objection to this, that the deed was not ſubſcribed by *David*; for, if a written conſent be neceſſary, it is ſufficient that

it be teſtified by the deed to which it is adhibited, altho' the deed be of a nature which requires not the ſubſcription of the conſenter.

*Pleaded* on the ſecond point for *Thomas Landale:* The charter 1719 could not convey to *Andrew* that perſonal right to the diſpoſition 1686, which was in *David:* for that, if a feudal right could be eſtabliſhed or conveyed by a conſent implied from facts and circumſtances, all property would be rendered precarious, and judges would become arbitrary.

If the charter 1719 was ineffectual for its principal purpoſe, *viz.* that of changing the holding, or of veſting the feudal right immediately in *Andrew*, it cannot be underſtood to be valid *quoad* the leſſer right, which was in *David* by the diſpoſition 1686: at any rate, a property in land cannot be eſtabliſhed or conveyed merely by conſent, although that conſent ſhould be proved by writing. The law, in order to produce this effect, requires a formal writing under the hand of the perſon whoſe conſent is neceſſary.

" The Lords found, That the charter 1719, granted by *Gibſon* of " *Durie* in favours of *David Landale* in liferent, and *Andrew Lan-* " *dale*, his ſon, in fee, neither eſtabliſhed a proper feudal right in " the perſon of the ſaid *Andrew Landale*, nor conveyed to him the " perſonal right that was in *David Landale*; and therefore ſuſtained " the reaſons of reduction, and aſſoilzied from the removing." D

Act. *J. Dalrymple, R. Dundas, H. Home.* Alt. *Mackintoſh, Scrymgeour, Lockhart.*
Reporter *Minto.* Clerk *Forbes.*

N° XIV. 13th *June* 1752.

*JOHN LOWDON* and other creditors of *EDWARD MURRAY* of *Drumſtenchill.*

againſt

*GIDEON MURRAY* tenant in *Drumſtenchill.*

*Alexander Murray*, being in poſſeſſion of the lands of *Drumſtenchill*, as apparent heir to his father *Edward*, ſet in tack a part of theſe lands to *Gideon Murray*, for the ſpace of 19 years, at the ſame rent they had formerly paid.

The creditors of the ſaid *Edward Murray* having adjudged the ſaid lands from *Alexander*, as charged to enter heir to his father, *John Lowdon*, one of the creditors, brought a ſale of the eſtate, and together therewith a reduction and improbation, as is uſual, in order to force production of all rights affecting the eſtate.

The ſummons of reduction and improbation was executed againſt *Gideon Murray*, the tenant, who appeared and produced his tack, againſt which the creditors objected, that it was null, being granted by an apparent heir. The Lord Ordinary, 2*d July* 1751, " ſuſtained the reaſon of " reduction of the tack, as flowing *a non habente poteſtatem.*

Long after the days of reclaiming were over, *Gideon Murray* applied to the Ordinary, and afterwards by petition to the whole Lords, ſetting forth, that the proceedings, in this proceſs againſt him, were irregular; for he was properly no party in the reduction, nor was the tack called for in the ſummons, or any ground of reduction thereof libelled, the proceſs being intended only to force creditors to produce their rights and diligences,

gences, that the ranking might go on; the ſummons was by miſtake executed againſt him, and he ignorantly produced his tack: but as the certification would not have ſtruck againſt the tack had he not produced it, ſo neither could it be reduced in this proceſs when produced. And, this being the caſe, he inſiſted that he was not forcloſed by the lapſe of the reclaiming days, becauſe the whole proceedings were void and null, and therefore the interlocutor ought to be recalled.

2*dly*, Altho' there were a proper proceſs of reduction brought, yet *John Lowdon* and the other creditors could not inſiſt therein, becauſe they are not infeft; and creditors not infeft cannot challenge a tacks-man whoſe right is real by poſſeſſion.

3*dly*, The tack is not null, as flowing *a non habente*; for it was ſet by an apparent heir, who, as he was intitled to continue his predeceſſor's poſſeſſion, of courſe was intitled to ſubſtitute another perſon in his own place, by granting him a tack of the lands; for this, amongſt other reaſons, that the lands might not lie waſte. At leaſt, ſeeing the apparent heir was more than three years in poſſeſſion, this tack muſt be valid by act 24. Parl. 1695.

*Anſwered* for *John Lowdon* and the other creditors: That, in a proceſs of this nature, creditors are intitled to object to any intereſt founded on in competition with them, and to remove all the incumbrances that ſtand in the way of their payment, as the tack in queſtion does; for tho' the lands may be ſet for the old rent, yet, as the tack is for the ſpace of 19 years, it muſt occaſion the lands to ſell at a lower price. And ſuppoſing that the certification would not have ſtruck againſt the tack if not produced, yet, ſeeing the tackſman compeared with his tack, and founded upon it, it ſurely was competent for the creditors to object to the validity of the tack: his own acting ſubjected himſelf to a trial of his title, and as he, no doubt, expected to avail himſelf of the judgement, had it been in his favour, ſo of courſe, it follows, that he cannot now complain of the incompetency of the proceſs, when judgment has gone againſt him.

With reſpect to the objection to the purſuers title to reduce, becauſe they are not infeft,

*Anſwered*, That, as the tackſman *provocavit ad judicium* by inſiſting on a preference in virtue of his tack, and thereby gave riſe to their objecting, he muſt ſtand or fall by the judgment given.

And, as to the power of an apparent heir to ſet tacks, it is *tritiſſimi juris*, that he has no ſuch power, having no right in himſelf further than to continue his predeceſſor's poſſeſſion; and tho' a tack, ſet by an apparent heir, three years in poſſeſſion, might be good againſt a ſubſequent heir upon the 1695, yet it cannot avail the tackſman in a queſtion with creditors, or with a ſingular ſucceſſor.

But it is needleſs to inſiſt further on theſe points: for, as the days for reclaiming were run long before the defender applied againſt the Lord Ordinary's interlocutor, the court cannot now conſider the purſuers title, nor enter into the merits of the reaſons of reduction.

" The Lords were of opinion, That, had the tack not been produced, " the certification in the reduction and improbation would not have " ſtruck againſt it: but, the Lords, in regard of the production of " the tack, found the tack void and null; and therefore adhered to " the Lord Ordinary's interlocutor." B.

Act. *Ro. Pringle.* Alt. *Jo. Dalrymple.* Clerk *Kirkpatrick.*

N° XV. 27th *June* 1752.

## *WILLIAM URQUHART* of *Meldrum*
against
## The OFFICERS of STATE and HERITORS of *Cromarty*.

THE kirk of *Cromarty* was one of the common kirks belonging to the Biſhop and chapter of *Roſs*; and, in 1588, King *James* VI. granted to Sir *William Keith* a charter of the barony of *Delry*, and certain other lands, containing an erection of the kirk of *Cromarty*, and other 18 kirks, which had belonged to the ſaid Biſhop and chapter, into parſonages, and granting to Sir *William* the tiends and patronage of theſe kirks, and uniting the whole into one barony; upon which Sir *William* was infeft. And in *June* 1592 this grant was ratified in Parliament.

This right came by progreſs into the perſon of Sir *Robert Innes*, who, in 1636, entered into a contract with the Biſhop of *Roſs*, narrating a proceſs of reduction and improbation which the Biſhop had againſt him for ſetting aſide his right to theſe patronages; and that, willing to prevent further queſtions, he reſigns all theſe patronages in the King's hands in favours of the Biſhop, declaring, that the Biſhop ſhould be at liberty to uſe that right, or his antient right, as he thought moſt proper.

On this contract a charter was expede in favour of the Biſhop in the ſame year 1636, and the Biſhop was infeft 19th *September* 1637. But the ſeiſin, as appeared from the regiſter, (for the principal was loſt) contained no ſymbol of infeftment, and wanted the ſign and ſubſcription manual of the notary.

In *July* 1656, the ſaid Sir *Robert Innes* diſponed the ſaid lands and patronages in favour of Sir *George Mackenzie* of *Tarbat*, afterwards Earl of *Cromarty*; on which Sir *George* expede a charter, and was infeft.

The Earl of *Cromarty* diſponed the eſtate and patronage of *Cromarty* in favour of his ſon Sir *Kenneth Mackenzie*; and the ſaid eſtate and patronage being brought to a judicial ſale by Sir *Kenneth*'s creditors, *William Urquhart* of *Meldrum* became purchaſer.

*William Urquhart* brought a declarator of his right of patronage, and called as defenders the Officers of State, the heritors of the pariſh, and the preſbytery, as is uſual.

*Pleaded* for the defenders, *firſt*, That the grant of the patronage of the kirk of *Cromarty* and the other kirks, by the King to Sir *William Keith* in 1588, was void and null; for that, as they belonged to the Biſhop and chapter of *Roſs*, the King had no power to diſpoſe of them without conſent of the Biſhop and chapter, who, notwithſtanding of the reformation, were ſtill exiſting at the date of the grant; for altho' the miniſtration, in offices of religion, was carried on by theſe called the *travelling Clergy*, yet they were not the clergy authoriſed by law till the year 1592, when preſbytery was eſtabliſhed; and it appears from the records of the Privy Seal, that, from the reformation to 1592, Biſhops continued to be elected by the chapters as formerly: three inſtances of which occur in 1572, *viz. St. Andrew's*, *Dunkeld* and *Sodor*. And chapters continued in the full right of their benefices till 1594, when their common kirks were taken from them. The King therefore having no power to make the grant, the ratification in Parliament could not make it valid, becauſe of the act *ſalvo jure*.

2*dly*,

2*dly*, By 2d act, Parl. 1606, and 2d act, Parl. 1617, reſtoring Biſhops and their chapters to their patrimony, the whole kirks, which had belonged to the Biſhop or chapter of *Roſs*, were reſtored to them; and tho' there be an exception in each of theſe acts, yet the caſe of the patronage in queſtion does not fall under either of theſe exceptions: for the exception, in the act 1606, of common kirks diſponed by his Majeſty to whatſomever perſons preceeding the act, does not refer to the caſe of a common kirk erected into a parſonage, where the patronage is diſponed to a laick; for that is not a diſpoſition of a kirk, which can only be to a kirkman; but the exception reſpects only caſes where the King had diſponed the kirk to another Biſhop, or ſettled a miniſter in it, who by the exception was to enjoy the benefice during his life.

Neither does the exception in act 1617, "That it ſhall be without "prejudice to laick patrons, of their patronages granted to them by the "King's Majeſty, with conſent of the titulars for the time", aid the purſuer: In the *firſt* place, becauſe it reſpects only the caſe where patronages of kirks had been granted away, which formerly belonged to the Biſhops and chapters, and were held and uſed by them in the ſame way as laicks uſed their patronages; but could never reſpect the menſal or common kirks, without which the Biſhops and their chapters could not be ſupported. In the *ſecond* place, The grant in favour of Sir *William Keith* was without conſent of the titular, whether the Biſhop and chapter be conſidered as the titulars, or the incumbent for the time, in terms of the act 172, Parl. 1593.

3*dly*, Suppoſing the grant valid, yet the crown, as come in place of the Biſhop of *Roſs*, ought to be preferred to the purſuer; for Sir *Robert Innes* in 1636 diſponed the patronage to the Biſhop; which was long prior to his diſpoſition in favour of Sir *George Mackenzie*, and therefore the Biſhop's right was preferable to Sir *George*'s, tho' no infeftment had followed on it; for a right of patronage, being *jus incorporale*, paſſes without infeftment, *Stair inſt. b. 2. tit.* 8, § 35. And tho' the patronage being united to a barony will make a conveyance of the barony tranſmit the patronage, tho' not particularly mentioned, yet it does not transform the nature of the right, ſo as to make it a corporeal one. But ſuppoſing it ſhould have the effect to communicate to this incorporeal right, the qualities of a corporeal one, yet, as ſoon as the union was diſſolved, theſe qualities flew off. Now the King, who created the union, had power to diſſolve it; and did ſo, by his charter upon Sir *Robert Innes*'s reſignation in favour of the Biſhop in 1636. Beſides it appears from the regiſter of ſeiſins for the ſhire of *Inverneſs*, that the Biſhop was infeft in this right upon the 19th of *September* 1637.

*Anſwered* for the purſuer to the firſt defence, That, before the date of the grant in favour of Sir *William Keith*, chapters were aboliſhed, and had no right either to officiate in kirks themſelves, or to preſent others thereto; for, from the beginning of the reformation, the proteſtant clergy, who were governed by their own ſuperintendents, were the clergy eſtabliſhed by law, as is declared by acts 6th and 7th Parl. 1567. By the laſt of which the right of laick patrons was reſerved to them: but the patronages which belonged to *Eccleſiaſticks*, now become by law incapable to exerciſe them, did of courſe devolve upon the crown; and ſo it has been underſtood by the legiſlature in all the ſtatutes relative to theſe matters. By act 100, Parl. 1581, it is ſtatute, "That every pariſh-kirk ſhall have "its own paſtor." And by act 102 of the ſame Parl., it is enacted, "That all benefices of cure under prelacies ſhall be preſented by Our

" Sovereign Lord and the laick patrons, in favour of able and qualified " miniſters". In this ſtatute the King is held to be patron of all kirks which were not of laick patronage, and ſo it has been always underſtood by our lawyers. *Craig*, lib. 2. dieg. 8. § 37.

And particularly with reſpect to common kirks, it was ordained by act 196, Parl. 1594, " That they ſhould be of the ſame nature with other " parſonages and vicarages, and ſhould be conferred by preſentation of " the lawful patrons." Sir *Geo. Mackenzie*, in his obſervations on this act, ſays, " That the King, or ſuch as had right from him became patron of " theſe kirks, as coming in place of the Popiſh clergy." And he alſo adds, " That there were not then chapters." With him agrees Lord *Stair*, *Inſt. b.* 2. *tit.* 8. § 35. *p.* 369. So there can be no doubt of the King's power to make the grant in favour of Sir *William Keith*. It is of no importance that there were ſome few elections of Biſhops by chapters ſoon after the reformation; for theſe were not elected with a view to have any ſhare in the government of the church, but rather to give their aſſiſtance in diſpoſing away the temporalities thereof to others.

*Anſwered* to the ſecond defence, That the act 1606 does plainly confirm all grants of this nature; for it " excepts and reſerves all *common kirks* " which are diſponed by his Majeſty to whatſoever perſon, preceeding " this preſent act." And this clauſe cannot be limited to the caſe of kirks diſponed to kirkmen, as appears from the following clauſe of the act, whereby it is provided, " That, if there be any common kirks pertaining to " biſhopricks and their chapters of old, that now pertains and falls to them " by virtue of this act, the miniſters who are lawfully provided to the ſaid " common kirks ſhall no ways be prejudged during their lifetimes." Here a plain diſtinction is made betwixt common kirks diſponed away to laicks, and thoſe conferred by preſentations to miniſters; the firſt are excepted from the act, the others are to return to the Biſhops and their chapters, ſaving the right of the incumbents during their lives.

Neither can the act 1617 be pleaded to defeat the effect of the grant in favour of Sir *William Keith*; for grants of that kind are expreſsly excepted from the act, and that without diſtinguiſhing whether the kirks were proper patronages veſted in the chapter before the reformation, or were common kirks. By the act, theſe grants are ſaved, tho' not ratified in Parliament; and therefore there can be no doubt of ſuch as are ſecured by ſo ample a ratification, as the one in queſtion is.

The conſent of the titular to the grant was not neceſſary, as that was only required to ſave grants not ratified in Parliament: and tho' it had been neceſſary, yet by *titulars* could not be meant the Popiſh chapters who were not then in being, and whoſe advice, if they had been in being, would never have been aſked. But the clauſe of act 1617 muſt refer to act 172, Parl. 1593, which requires the conſent of the beneficed perſon; and if ſo, it is incumbent on the defenders, before their objection can be ſuſtained, to prove that there was a beneficed perſon alive at the date of the grant; and tho' they proved this, yet, *poſt tantum temporis*, it muſt be preſumed that the conſent was given, as the Lords lately found in the caſe of the patronage of *Culroſs*. And tho' not preſumed, yet as the objection operates only in favour of the crown, it is excluded by the ratification, and is alſo cut off by the negative preſcription.

To the third defence, *anſwered*, That there are proper ſymbols eſtabliſhed for infefting ſingular ſucceſſors in rights of patronage, as well

as

as in other real rights: but whatever might have been the caſe with reſpect to a right of patronage upon which no infeftment had ever paſs'd, to which the citation from Lord *Stair* refers, yet, when the patronage was once united to a barony, and infeftment taken upon it, it could not be tranſmitted without infeftment, and therefore Sir *George Mackenzie*'s prior infeftment (ſuppoſing the Biſhop not to have been infeft) muſt carry this right. Had Sir *Robert Innes* diſponed the whole barony, as well as the patronage to the Biſhop, and afterwards diſponed the whole to Sir *George*, it could not have been diſputed that Sir *George*'s right would have been preferable, in reſpect of the firſt infeftment; and it muſt be a very extraordinary paradox if an acquiſition ſhould be more effectual when the acquirer gets only a part of the ſubjects contained in his author's infeftment, than if he had got the whole.

With reſpect to the infeftment ſaid to have been taken by the Biſhop; a reference to the records, in a competition of real rights, is not ſufficient; the defenders muſt either produce the principal ſeiſin, or prove the tenor of it. 2*dly*, The ſeiſin, ſuch as it appears from the records, is null, becauſe it bears no ſymbol of infeftment, and wants the ſign and ſubſcription manual of the notary.

*Laſtly*, As the purſuer acquired this right at a judicial ſale, he is ſecured by act 6, Parl. 1695; and whatever action, under the right of the Biſhop, may lie againſt the receivers of the price, there can lie none againſt the purchaſer.

" The Lords repelled the firſt and ſecond defences, and remitted it to " the Lord Ordinary to hear parties on the third defence, *viz.* " whether the Biſhop of *Roſs*'s right from Sir *Robert Innes* is pre- " ferable to the purſuer's; and alſo to hear parties on the act of " Parliament 1695.

B

Act. *Ferguſon*. Alt. *Advocatus* and *Boſwell*. Reporter, Lord *Kilkerran*. Clerk *Gibſon*.

N° XVI. 30th *June* 1752.

## The DUKE of *NORFOLK* and PARTNERS, againſt The TRUSTEES for the Annuitants of the *YORK-BUILDINGS* Company.

THE *York-buildings* company purchaſed from the publick many of the eſtates in *England* and *Scotland* forfeited upon account of the rebellion in the year 1715.

For the encouragement of that company, and other purchaſers of theſe eſtates, and to enable them the better to pay the prices at which the eſtates had been ſold, it was enacted by 6th *Geo.* I. *cap.* 24. " That it ſhould " be lawful for ſuch purchaſers, to grant and ſettle rent-charges or annui- " ties to the extent and yearly value of the eſtates:" and it was further enacted by 7th *Geo.* I. *cap.* 20. " That it ſhould be lawful for the com- " pany to ſell ſuch annuities by way of lottery."

Under the authority of theſe two acts of Parliament, three ſeveral lotteries were made; and, among other conditions of theſe lotteries, the fortunate tickets intitled the reſpective proprietors to a liferent-annuity out of the company's eſtates.

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The lotteries being drawn, theſe fortunate tickets were, from time to time, brought to the company, and exchanged for bonds of annuity, obliging the company to pay certain annuities to the reſpective proprietors of the tickets and their aſſigns, during the life of ſome perſon whoſe name was inſerted in ſuch bond; with this proviſo annexed, That if the annuity ſhould be in arrear, it ſhould be lawful for the annuitant to enter upon the company's eſtates, and diſtrain for payment.

The annuities having run in arrear, and the annuitants finding it impracticable to recover the arrears by diſtraining in terms of the bonds, the company entered into an indenture with the annuitants; by which the company became bound to obtain infeftments on the ſeveral eſtates in *Scotland*; and being ſo infeft, to grant proper infeftments to *Abraham Mure*, and others, as truſtees for themſelves and the other annuitants, for ſecurity of the annuities due to the perſons whoſe names and annuities were particularly contained in a ſchedule thereunto annexed.

Soon thereafter the company were infeft, and they granted a diſpoſition to the truſtees, in terms of the indenture, and bearing relation to the ſchedule; and, upon the precept of ſeiſin contained in this diſpoſition, the truſtees were infeft in the year 1728. But it is to be obſerved, that neither the indenture, nor the ſchedule, nor the diſpoſition, make any mention of the bonds above mentioned, which were exchanged for the tickets, nor of the names of the lives inſerted in theſe bonds.

After theſe tranſactions, many of the annuitants diſpoſed of their annuities; but being ignorant of the law of *Scotland*, concerning the forms of transferring real rights, their method was, that the annuitant-ſeller aſſigned or delivered his bond to the purchaſer; and the purchaſer delivered up that bond, together with the aſſignation thereto, (when he had been at the pains to take an aſſignation) to be cancelled: whereupon the company granted a new bond to the purchaſer. And it was further remarkable, that, in many inſtances, inſtead of the name of the life in the original bond, the name of ſome other life was inſerted in the new bond.

The Duke of *Norfolk* and his partners, creditors of the company, having adjudged the company's eſtates in *Scotland*, were thereon infeft. And it is to be obſerved, that the exchange of many of the old annuity-bonds for the new ones, in manner above mentioned, was made after the debt to the Duke was contracted, but of all of them, before his infeftment was taken.

The Duke raiſed an action of reduction and improbation of all the rights granted to the ſaid truſtees.

*Inſiſted* for the Duke, That none of theſe new annuity-bonds, whether conſidered as independent of the old bonds, or as *ſurrogata* to them, can be intitled to the ſecurity of the truſtees infeftment.

*Primo*, As to the ſecurity independent of the old bonds; it is an undoubted maxim of our law, That a real lien cannot be effectually eſtabliſhed upon lands for a debt even exiſting at the time of the infeftment, if that debt is not certain, and diſcoverable either by the infeftment itſelf, or by ſome relative deed: far leſs can ſuch a lien be eſtabliſhed, where the debt does not exiſt at the time of the infeftment. To admit of the contrary, were to make it impoſſible for purchaſers of lands, to have ſecurity of their purchaſes, and ſo in effect, were to put lands *extra commercium*. As therefore theſe new annuities not only did not appear from the indenture, diſpoſition or ſchedule, or from any relative bond exiſting at the time

time of the truſtees infeftment, but are of a date poſterior to that infeftment, ſo they can have no benefit by it; eſpecially as this infeftment does not bear to have been granted with any ſuch intention, but only to ſecure annuities then exiſting, and particularly ſpecified, as to the creditors names and ſums, in a ſchedule referred to in the diſpoſition.

2*do*, If it be contended that the new bonds are *ſurrogata*, and are therefore, in point of equity, intitled to the real ſecurity; it is firſt to be obſerved, that it is not yet proved by production of any of the original bonds or aſſignments thereto, that the new bonds had been actually taken in place of the old ones, and the old ones cancelled upon granting the new ones, in the belief that the real ſecurity continued: nevertheleſs, in the mean time taking the fact to be ſo, it is an undoubted maxim of the law of *Scotland*, that, for the ſubſiſtence of a real ſecurity, all the parts of which that ſecurity is compoſed muſt be kept ſubſiſting: if infeftment is taken upon an heritable bond, that bond diſcharged or cancelled, the ſecurity is gone: the infeftment cannot ſubſiſt without its warrant. In like manner, when a ſecurity is ſo conceived that the immediate warrant is not ſufficient to make it compleat; as for inſtance, where the diſpoſition does not contain the names of the creditors, but refers to a ſchedule; and where that ſchedule does not fully diſcover the extent of the debts, by mentioning the names of the lives during which the debts (being annuities) are to ſubſiſt, but leaves that to be diſcovered from ſeparate bonds, in that caſe, which is the very caſe here, the bonds, altho' not expreſsly referred to, make an eſſential part of the real right; and, upon the cancelling or diſcharging any of theſe bonds, the real right is in ſo far extinguiſhed; and any new bonds, granted for the like ſum or annuity, are new rights. If the *bona fides* or *ignorantia juris* in a foreigner was to ſupercede the neceſſity of obſerving the feudal forms of conveying and conſtituting real rights, an abſolute uncertainty would be introduced into our law as to ſuch rights. The error of the annuitants might poſſibly afford them a good ground to be reſtored to their real rights againſt the debtor, but can never give them a right to enter into competition with third parties. Had there been ſureties bound for the firſt annuities, or had the lands been ſold, the cancelling the original bond would have ſet free the ſureties, or made way for the purchaſers infeftment; and the granting new bonds for the ſame debts could neither have revived the obligation of the ſureties nor the firſt infeftment. Upon this principle, it is not material whether the exchange of new for old bonds was made before or after the Duke's contraction, before or after his infeftment.

As to the caſe of thoſe new bonds where the names of the lives are changed, they are ſo far in a worſe condition than the others; that the alteration of the life, or endurance of the annuity, is a total alteration of the annuity.

*Pleaded* for the Truſtees, That, as to the ſupporting the annuities independent of the old bonds, it is maintained, that, by the law of *Scotland*, infeftment may be given for debts not conſtituted by any bond or ſecurity. An infeftment may be granted to truſtees for ſecurity of their expences of management, altho' no ſeparate bond is given; alſo for payment of certain debts or proviſions to children, or donations contained in a liſt or ſchedule ſigned by the granter; and altho' ſuch debts, proviſions or donations may be reduced on implied fraud, yet are they not contrary to feudal principles. Neither does our law hinder real ſecurities

from being granted for future debts, as in the inſtance above mentioned, of the expences to be incurred by truſtees, or of a jointure to a wife in caſe ſhe ſhall ſurvive her huſband. The act of Parliament 1696, *Will.* Parl. 1. ſeſſ. 6. cap. 5. ſuppoſes that diſpoſitions may be granted for ſecurity of future debts; which diſpoſitions, altho' declared null in the caſe mentioned in that act, yet are not contrary to the principles of the feudal law. There was nothing therefore to hinder the infeftment from being taken even for annuities to be granted after its date. But the annuities here are not on ſo narrow a bottom; they are the very annuities ſubſiſting at the date of the Truſtees infeftment. The proprietors of the fortunate tickets were, under the authority of two acts of Parliament, intitled to a liferent annuity before granting any bonds, and without dependance upon them. The bonds were found ineffectual for eſtabliſhing a real right upon the eſtates: an infeftment is therefore taken, not bearing relation to theſe bonds; for neither the indenture, ſchedule, nor diſpoſition make any mention of the date of theſe bonds, ſo that, by the form of the infeftment, the annuities would ſeem perpetual. Bonds were therefore no part of the real right: they contained only the limitation of its endurance: their chief uſe was to prove the names of the lives. If ſo, the cancelling of the bonds cannot be conſtrued to be an extinction of a debt, which was eſtabliſhed without reſpect to any bond.

In the next place, Theſe new bonds muſt, upon the ſtrongeſt reaſons of equity that can well be figured, be conſidered as *ſurrogata* to the old ones, and be intitled to the ſame ſecurity. In *England* a *choſe in action*, (which comprehends bonds) cannot be properly aſſigned; and tho', when a bond is aſſigned, the aſſign has an equitable right to the debt, yet he cannot ſue otherwiſe than as attorney for the aſſigner. For this reaſon it is there common for the aſſign to chuſe rather to have a legal right of action by taking a new bond, than to reſt upon the equitable right. Miſled by this cuſtom, the purchaſers of the annuities, being foreigners and ignorant of our law, made the exchange of the old for new bonds; and it is not to be ſuppoſed that either they, or the company, had the leaſt ſuſpicion, far leſs intention, that the ſecurity would be thereby extinguiſhed. Further, the law of this country, with reſpect to foreigners, is *fact*; and *error facti nemini nocet*. Even *ignorantia juris in damnis amittendae rei ſuæ non nocet*. All this argument is further ſupported by this conſideration, that, when the Duke's debt was contracted, the whole annuities appeared ſubſiſting by the record; he can therefore plead no deception upon that head: and, in fact, ſeveral of the exchanges were made after the contracting of his debt; ſo that as to them, he has ſuffered no real prejudice, and he ought to take no advantage of the error.

With regard to ſuch of the new bonds, where the nominees or lives are changed; as no fraud was intended or uſed, and as one life is much the ſame as another; and in fact the new lives have failed in many inſtances where the old ones are ſtill exiſting: theſe bonds are very much in the ſame ſituation as the others where the lives continue the ſame. At leaſt, if equity is to be the rule, the annuity ſhould in this caſe continue during the life of the firſt nominee: or if even that is thought too much, during the joint life of the old and new nominee.

When this cauſe was heard on the 14th *February* 1752, the Court, very clear as to the law, but moved by the circumſtances of the caſe, found to the following effect, *viz.* That, by the laws of *Scotland*, the annuitants could

could have no real right, in virtue of the truſt-infeftment, for ſecurity of bonds granted after the date of that infeftment; but, in reſpect of the circumſtances of this caſe, and that it appeared that ſeveral of the ſaid creditors, unacquainted with the laws of *Scotland*, had erroneouſly given up to the company the old bonds which had been duly aſſigned to them, and, in place thereof, taken new bonds for the ſame annuities in their own names, in the belief that their real right and ſecurity was not thereby impaired; and as the Duke, whoſe debt was contracted before making the ſaid exchanges, had ſuffered no prejudice thereby, ſo he ought to take no advantage of the error: therefore that ſuch annuitants ought to be preferred and ranked upon the company's eſtates in *Scotland*, as if they were ſtill poſſeſſed of the old bonds intire and uncancelled: but that where the nominees or names of the lives in the old bonds were changed in the new bonds, the annuity could only ſubſiſt during the joint life of the new and old nominee.

Againſt that interlocutor the Duke reclaimed, and greatly inſiſted upon the danger of departing, in any caſe however favourable, from the known and eſtabliſhed rules of our law. The Lords, upon hearing that petition; and anſwers thereto, altered, and found,

" That the annuitants, whoſe names are not mentioned in the ſchedule " annexed to the diſpoſition of the Truſtees, or who have delivered " up the old bonds granted prior to the date of the diſpoſition and " infeftment, and have taken new bonds (altho' either in their own " names, or in the names of their aſſignies) poſterior to the infeft- " ment upon the diſpoſition, have no real right upon the lands " diſponed to the Truſtees, and in which they ſtood infeft; and " therefore can have no preference to the Duke of *Norfolk*, upon " the company's eſtates in *Scotland*." *Affirmed*. s

Act. *James Ferguſon, Henry Home.* Alt. *Robert Craigie, Alexander Lockhart.* Clerk *Gibſon.*

N° XVII. 30th *June* 1752.

## *ANDERSON* and OTHERS
againſt
## The MAGISTRATES of *RENFREW*.

*JOHN Anderſon* and others, burgeſſes of *Renfrew*, raiſed a reduction of a long leaſe of the common property, which the Magiſtrates and Town-council had granted.

The Magiſtrates and Town-council objected to the title of the purſuers, and *Pleaded*, That private burgeſſes cannot compel their Magiſtrates to render account of their adminiſtration. The abuſes which may prevail in the management of the patrimony of boroughs, are to be corrected, not by a popular action, but by other methods which the law has appointed: anciently theſe things were ſubjected to the controul of the chamberlain; by the 26th act, 4th Parl. *Ja.* V. the Magiſtrates of boroughs were obliged to account for the common-good yearly in exchequer; and, by 28th act, 1693, it is declared, that it is the royal prerogative to overſee and controul the management of the common good of boroughs, and that the crown will appoint for that purpoſe commiſſioners to be veſted with the powers

powers which were in the exchequer. Such are the provisions made by the wisdom of the legislature, and by these only is the administration of Magistrates to be examined, and their malversations corrected.

*Answered* for the pursuers, The purpose of this reduction is to enforce the observance of a publick law, and to vindicate a right of pasturage which the pursuers have, by immemorial possession, acquired; and therefore the objection to the title must be repelled; more especially, as in the case of *Johnston* against the Magistrates of *Edinburgh* 1735, the Lords found, That *Johnston, qua* burgess, had a sufficient title for carrying on a reduction of feu granted by the Magistrates of *Edinburgh* of the mills belonging to that city.

" The Lords found the pursuers had a sufficient title to carry on this " process. D

Act. *Lockhart*. Alt. *Advocatus*. Reporter *Minto*. Clerk *Pringle*.

N° XVIII. 30th *June* 1752.

*ANNANDALE*

against

*BROWN*.

*DAVID Annandale* merchant in *Edinburgh* settled the liferent of a house on *Christian Key* his wife, in the event of her surviving him, and also executed in her favour a disposition of his moveables, expressly burdened with payment of all his debts. After his death *Key* intromitted universally with his moveables, yet so, that after payment of the privileged debts due by the deceased, her superintromissions appeared not to have exceeded 2 *l. sterling*.

*Key* the widow was afterwards married to *Peter Brown* wig-maker in *Edinburgh*, the defender, and they, during the existence of the marriage, paid to *Priscilla Handaside* the sum of 50 *l. sterling*, which the deceased *Annandale* owed her by bond; instead of taking receipt for that sum, they made *Handaside* grant an assignation of it to a trustee for their use; in consequence of this assignation, the trustee adjudged the house above mentioned which had belonged to *Annandale*.

After the death of *Key*, *William Annandale* the pursuer, brother and heir of *David Annandale*, having raised a reduction of the assignation, and of the adjudication which followed upon it, *Pleaded*, That, as *Key*, by her acceptance of the disposition made in her favor by her husband *Annandale*, became burdened with the payment of all his debts, she and *Brown* her second husband must be understood to have paid *Handaside*'s debt in compliance with this obligation; and that debt, being thus extinguished, cannot now subsist in the person of *Brown*, (who derives right from *Key*) so as to affect the heritage of *Annandale*.

*Answered* for the defender *Brown*, Altho' action had been brought against *Key* herself, she would not have been burdened in consequence of the disposition by her first husband beyond the amount of the subjects with which she intromitted, as was found in the case *Thomson* against the *Creditors* of *Thin*, 28th *December* 1675, observed by *Stair*: action indeed lay against her as vitious intromitter, but it could not in law have affected her husband, might have been avoided by her confirmation, was extinguished by

by her death, and in no event would have benefited the purſuer, who is not creditor but heir of *Annandale*.

" The Lords repelled the reaſons of reduction, and found that the de-
" fender was intitled to take an aſſignation to the bond in his own,
" or in a truſtee's name." D

Act. *A. Pringle.* Alt. *Ferguſon.* Reporter *Juſtice Clerk.* Clerk *Murray.*

N° XIX. 1ſt *July* 1752.

Sir *KENNETH MACKENZIE* Baronet

againſt

*JOHN STEWART* Eſq;

BY a deed of tailzie executed in the year 1688, *George* Earl of *Cromarty* diſponed the lands of *Royſton* to Sir *James Mackenzie*, his third ſon, (afterwards one of the ſenators of the college of juſtice, and known by the name of Lord *Royſton*) and to the heirs male of his body; whom failing, to Sir *Kenneth Mackenzie* (ſecond ſon of the tailzier) and to the heirs male of his body; whom failing, to certain other ſubſtitutes. This diſpoſition contains prohibitory, irritant and reſolutive clauſes, declaring that it ſhall not be lawful for Sir *James Mackenzie*, or the other heirs of tailzie, to alter the order of ſucceſſion, to incumber or to alienate the ſaid lands. In 1739 Lord *Royſton*, with concurrence of his only ſon *George*, and of Sir *George Mackenzie*, (ſon of Sir *Kenneth*) obtained an act of Parliament enabling him to ſell the lands of *Royſton*. The act proceeds on a narrative, that the lands of *Royſton* were burdened with certain debts, contracted by the tailzier himſelf; for payment whereof the lands might be adjudged and carried off: that theſe debts could not otherwiſe be diſcharged than by a ſale of the lands; that ſuch ſale, though for the advantage of the heirs of tailzie and of the creditors, could not be effected without the aid of Parliament, *&c.* Therefore the act impowers certain truſtees, in concurrence with Lord *Royſton*, to ſell the eſtate, and apply the price in payment of the above ſums with which it ſtood burdened: as alſo to lay out the ſurplus money in the purchaſe of other lands, to be ſettled for the uſe of Lord *Royſton*, and the other ſurviving heirs of tailzie, in terms of the deed 1688; and the act contains a *ſalvo* of the rights of all perſons " except the ſaid Sir *James Mackenzie* and the heirs male of his " body, the heirs male of the body of Sir *Kenneth Mackenzie*, and the o-" ther ſubſtitutes in the entail."

In conſequence of this authority, the eſtate of *Royſton* was ſold, and by payment of the debts narrated in the act of Parliament, the price was exhauſted. After the death of Lord *Royſton* and of his ſon, Sir *George Mackenzie*, having obtained himſelf ſerved and retoured heir male and of tailzie, brought an action of compt and reckoning againſt *John Stewart*, Lord *Royſton*'s heir of line, and againſt the truſtees, ſubſuming that the debts, narrated in the act, did not affect the tailzie, and concluding that they ſhould be decerned to apply, in terms of the act, the ſurplus price of the lands of *Royſton*, after payment of the debts affecting the tailzie. Sir

*George* having died, his brother Sir *Kenneth* inſiſted in this action as heir of tailzie.

The defender endeavoured to ſhow, that the debts narrated in the act were indeed a real burden upon the tailzie; yet he inſiſted chiefly in this preliminary defence, that the act of Parliament was final, and excluded all examination into the reality of the debts.

*Pleaded* for the purſuer: This action is not barred by the act of Parliament, the act expreſsly bears, that it would be for the advantage of the heir of tailzie that the eſtate of *Royſton* were ſold and the debts affecting it paid. Now, it is neither agreeable to the words, nor to the purview of the act, that the price of the eſtate ſhould be applied for the clearing of debts with which the tailzie was not burdened; for this, inſtead of benefiting the heirs of the tailzie, would diſappoint them of their juſt right: it is alſo to be conſidered that by act 18. Parl. 1. *Ja.* VI. the Lords of Seſſion are declared judges competent in the reduction of infeftments ratified in Parliament; for this obvious reaſon, that the law did not intend to hurt third parties, whoſe rights had not been particularly examined in Parliament; and it is a rule in the interpretation of all *Britiſh* ſtatutes, that no innocent perſon ſuffer by a literal conſtruction of the law.

*Anſwered* for the defender: The act of Parliament avers that the debts in queſtion were juſt debts, and which affected the tailzie: it alſo declares the purſuer to be a party to it. No court of law can try the truth of its averments, the juſtice of its concluſions, or the equity and expediency of what it directs: were ſuch powers given to courts of law, their inſtitution would be inverted, and judges, from being executors of the law, and adminiſtrators of juſtice according to law, would become law-givers themſelves. The act 18. Parl. 1. *Ja.* 6. can have no influence in the preſent caſe; for the act *ſalvo jure cujuſlibet*, which paſſed every ſeſſion of Parliament in *Scotland*, reſerved the rights of all perſons who were not parties in the ratifications obtained in Parliament, and the deciſion in ſuch caſes was left to common law; yet even in *Scotland* ratifications were ſometimes excepted from the act *ſalvo jure*, and parties thereby prejudiced were left without remedy from any court of law. This appears from the exceptions mentioned in the act *ſalvo jure* ſubjoined to the acts of Parliament 1633; and from the deciſion 25th *March* 1631, Biſhop of *Dunkeld* againſt Lord *Balmerino:* but, what ever may have been the practice of the *Scottiſh* Parliament with reſpect to private acts, it is certain that a private act of the *Britiſh* Parliament differs, not in authority, but in extent from a publick act; the rights of all thoſe, who are not made parties to it, are reſerved intire; yet, *quoad* thoſe who really are, or whom the act declares to be parties to it, it has all the efficacy of a publick law.

" The Lords found, That theſe debts, that by act of Parliament are " appointed to be paid out of the price of the eſtate of *Royſton*, muſt " be ſtated to exhauſt the ſaid price; and that, the price of the " eſtate being exhauſted by theſe debts, there is no ground for a fur- " ther compt and reckoning." D

*Reversed.*

Act. *Hay.* Alt. *R. Cragie.* Reporter *Leven.* Clerk *Kirkpatrick.*

*BRIGS*

N° XX. 1ſt *July* 1752.

*BRIGS* and OTHERS

againſt

The Duke of *BUCCLEUGH.*

BY act of Parliament 1685, certain tolls were appointed to be levied at the two bridges of *Dalkeith*, and the power of levying them was granted to the bailie of the regality of *Dalkeith*, and his deputy, and their ſucceſſors in office, for particular uſes narrated in the act. The regality of *Dalkeith* having been taken away by act of Parliament 20. *Geo.* II. and the office of bailie of regality thereby aboliſhed, *Brigs* and others, inhabitants of *Dalkeith*, prayed the Lords to appoint a factor for levying of the ſaid tolls.

The Duke of *Buccleugh* (to whoſe family the regality of *Dalkeith* belonged) oppoſed this, and *pleaded:* That the act, by which the tolls were granted, impowered the bailie of regality of *Dalkeith* to levy and apply them; that his power naturally devolves to the baron bailie, as he is the only magiſtrate now remaining within the territory of *Dalkeith*, and derives his juriſdiction, as the bailie of regality did, from the proprietor of *Dalkeith:* and, *ſeparatim*, if any doubt ſhould ariſe as to this, it could only be removed by the legiſlature itſelf.

" The Lords found the baron bailie of *Dalkeith* muſt come in place of " the bailie of regality for uplifting the tolls and cuſtoms mentioned " in the petition, and therefore refuſed to ſequeſtrate." D

Act. *R. Dundas.* Alt. *R. Craigie.* Clerk *Kirkpatrick.*

N° XXI. 1ſt *July* 1752.

The Earl of *GALLOWAY* and OTHERS

againſt

The Earl of *MORTON.*

THE Earl of *Galloway* and others, udalmen of *Orkney*, in a declarator raiſed by them againſt the Earl of *Morton* ſuperior of *Orkney*, inſiſted *inter alia*, that it ſhould be found, that the duty called *Skat*, anciently payable out of their udal lands in *Orkney*, ceaſed from the year 1667, when the ſupplies by aſſeſſment were introduced, and theſe their lands became ſubject to the aſſeſſment in common with the reſt of the kingdom.

In this declarator they *pleaded:* That udal and allodial are ſynonymous terms; that, out of allodial lands, no feu-duty or rent ſervice could, in the nature of the thing, be exigible, for that the King was not *dominus directus* or ſuperior in allodial lands: that the duty called *Skat*, anciently payable to the crown out of theſe lands, was in truth a yearly land-tax or tribute impoſed for the ſupport of the ſtate, and conſequently that, as the udal lands now paid land-tax according to their valuation, they ought to be exempted from the payment of *Skat* or land-tax to the Earl of *Morton* alſo.

To all which the Earl of *Morton* made anſwers, denying both the poſi-

tion

tion itſelf, and the conſequences drawn from it; yet he inſiſted in this preliminary defence, that his right to the *Skat* duties was ſecured by preſcription, for that theſe duties had been paid to the crown for the udal lands of *Orkney*, from the 1667 (when the aſſeſſment was introduced) down to the year 1707; and from that time, without interruption, to the Earls of *Morton*, having right to theſe duties as part and pertinent of the Earldom of *Orkney*.

The Lords gave not judgment on the general point; but, ſuſtaining the preliminary defence,

" They aſſoilzied the defender from the concluſion of the declarator " with reſpect to the *Skat* duties." D

Act. *J. Gordon, Hay, Lockhart.* Alt. *R. Dundas, Wedderburn & Advocatus.* Clerk *Juſtice.*

N° XXII. 3d *July* 1752.

*DEAN* and OTHERS
againſt
The MAGISTRATES of *IRVINE*

IN mutual declarators of the above parties, the queſtion was, whether the magiſtrates and town council of boroughs may grant feu-rights of the boroughs property, or tacks of a longer endurance than three years?

*Pleaded* for *Dean, &c.* The property of the common-good is in the community, and the magiſtrates are only adminiſtrators of it: they may exerciſe every act of rational adminiſtration, but they may not alienate, for that is the characteriſtic of property itſelf: nor can it be anſwered that the magiſtrates of *Irvine* claim only a limited power of alienation, by providing that the feu-duty be without diminution of the rental; for neither does this alter the nature of the feu which is ſtill an alienation, nor can it apply to this particular caſe, for the lands belonging to the community have never been rentalled. That no part of the common-good of boroughs can be feued out, is expreſsly aſſerted by *Craig, de feudis lib.* 1. *dieg.* 15. § 16. and by *Balfour, Practics cap.* 3. This alſo appears to have been the ſenſe of the legiſlature; for it never would have limited to three years the endurance of every tack of the common property of boroughs, and at the ſame time have left with the magiſtrates an abſolute power of alienating the whole.

That magiſtrates of royal boroughs may not grant tacks of the common property beyond the term of three years, is evident from the act 36. Parl. 3. *Ja.* IV. and act 181. Parl. 13. *Ja.* VI. theſe acts were ſuppoſed to be in force by *Mackenzie*, as appears from his obſervations upon the former of them, and from the deciſion 27th *January* 1681, *Jack* againſt town of *Stirling*; and that of the 16th *December* 1735, *Macghie* againſt the Magiſtrates of *Edinburgh*, proceed upon the ſame ſuppoſition.

It was *pleaded* ſeparately for *Dean, &c.* That, if the magiſtrates be permitted to feu out the common property, the community, the heritors of the burgage-tenements, and thoſe who poſſeſs in their right will be deprived of that ſervitude, or that right of paſturage, of feal and divot which they

they have immemorially enjoyed as parts and pertinents of their burgage tenements.

*Anſwered* for the Magiſtrates and Town-council: To grant in feu-farm or ſet in tack, for any term of years, the lands belonging to the borough, is, in the magiſtrates, a rational act of adminiſtration: by no other method can they improve the common-property, adorn the borough, and increaſe its revenues: nor has any ſtatute declared this to be illegal. It is evident that the magiſtrates of boroughs were originally intitled to allocate the lands belonging to the community, in burgage, and wherefore not in feu-farm? The two ſtatutes cannot avail the inhabitants in their declarator, for they relate to tacks not of the lands of boroughs, but of their rents; not to the *ipſa corpora*, but to the *proventus* of the common-property; for that ſuch rents were very antiently ſet in tack, appears from the *iter camerarii cap.* 39. § 37. agreeable to what has been ſaid is univerſal cuſtom: magiſtrates of boroughs do not limit the tacks of the ſubjects belonging to the community to the term of three years, but vary their endurance as they ſee moſt expedient; and, when the general utility requires it, they, inſtead of granting leaſes, grant feus of the common-property.

To the right of ſervitude pleaded upon, it is anſwered: That the community cannot acquire any ſuch right over lands which are its property; that inhabitants cannot, for that they have no permanent intereſt in the borough; that burgeſſes cannot, for, that as ſuch, they have no real eſtates in the borough; heritors indeed might acquire this ſervitude, but the fact is, that they have conſtantly paid according to the number of their cattle, for the privilege of paſturage by them enjoyed.

" The Lords found the purſuers have a right to ſet feus and tacks for " a longer time than three years, and remitted to the Ordinary " to hear parties procurators if theſe feus and tacks are ſet for " the benefit of the community, and if, or not, the paſturage on " the ſaid commonity is thereby meliorated." D

Act. *Elliot, Brown, Hay & Lockhart.* Alt. *J. Grant, R. Dundas, Ferguſon & R. Craigie,*
Reporter *Strichen.* Clerk *Kirkpatrick.*

N° XXIII. 3d *July* 1752.

*ALEXANDER BRODIE* of *Brodie*, Eſq;

againſt

Sir *ROBERT GORDON* of *Gordonſtoun*, Bart.

SIR *Robert Gordon* is poſſeſſed of lands in the pariſh of *Kinnedar*, to the yearly amount of 60 chalders of victual: on this eſtate he has three dove-cotes, and began lately to erect a fourth, not two miles diſtant from the others, and near the boundary which divides his eſtate from *Brodie's*. *Brodie* obtained letters of ſuſpenſion of this new building, and *pleaded*: That the act 19. Parl. 22. *Ja.* VI. provides, 1*mo*, that no perſon be permitted to build a dove-cote who has not at leaſt lands to the yearly amount of ten chalders of victual within two miles of it: and, 2*do*, that no perſon, although having lands to the amount of ten chalders, be permitted to build two dove-cotes within two miles of each other; and therefore

concluded, from the ſtate of the caſe, that Sir *Robert Gordon* had no right to proceed in building the projected dove-cote.

*Anſwered* for Sir *Robert Gordon:* The ſtatute provides that no perſon, having leſs than ten chalders in yearly rent, be permitted to build a dove-cote, and that he who has ten chalders be permitted to build one only; but it has introduced no limitations with reſpect to him who poſſeſſes more than ten chalders in yearly rent: neither do the words in the ſtatute, *within the bounds aforeſaid*, imply that one dove-cote only may be erected within the ſpace of two miles, but that one dove-cote only may be erected within the limits of that ground, whoſe yearly rent extends to ten chalders.

" The Lords repelled the reaſons of ſuſpenſion." D

Act. *Hamilton Gordon.* Alt. *R. Dundas.* Reporter *Elchies.* Clerk *Pringle.*

N° XXIV. 4th *July* 1752.

*CLERKS* Petitioners.

*JAMES* and *George Ruſſels* purſued *James Clerk* and his ſons before the Sheriff-depute of *Stirling*-ſhire for a battery: their libel concluded alſo, that the defenders ſhould pay an aſſythment, and find caution of law-borrows. The Sheriff decerned in the law-borrows, and found expences due, but made no mention of aſſythment in his ſentence. The *Clerks* ſuſpended: the Lord Ordinary turned the decreet into a libel, and then, beſides adhering to the Sheriff's interlocutor, found aſſythment and damages due.

*Pleaded* in a reclaiming petition for *Clerks:* The Ordinary's interlocutor is not agreeable to form, and cannot ſubſiſt: for that a decreet, which exceeds the demand of the purſuer, is intrinſically null: now in this caſe the charge of the purſuers was the decreet of the inferior judge, nor did they ever demand more than that the letters ſhould be found orderly proceeded.

The Lords were of opinion, That, whenever a decreet is turned into a libel, not only the decreet of the inferior judge, but alſo the original libel is underſtood to be before the court, and therefore

" They refuſed the petition." D

Petitioner *Andrew Pringle.*

N° XXV. 7th *July* 1752.

*WALTER MILLER* Procurator-fiſcal of the Borough of *Perth*

againſt

*ALEXANDER CLUNIE* and OTHERS.

IN 1748, by act of the town council of *Perth*, the inhabitants were prohibited, under certain penalties, from importing any ale or beer brewed without the liberties of that borough: *Alexander Clunie* and company having been purſued before the Magiſtrates, at the inſtance of the Procurator-fiſcal, for tranſgreſſion of this act, the caſe was advocated by conſent of parties.

*Pleaded*

*Pleaded* for *Walter Miller* procurator-fiſcal: The town of *Perth*, by its charter of erection, and by ſubſequent grants from the crown in its favour, is intitled to all the privileges of any royal borough in *Scotland:* that its magiſtrates have not exceeded, in their act of council, the powers given them by law, is evident from the caſe of the Magiſtrates of *Muſſelburgh*, decided not many years ago, where it was found that they were intitled to prohibite the importation of ale into the borough: if ſuch are the rights of a borough of regality, *a fortiori* muſt they belong to a royal borough, more eſpecially to ſuch an one as *Perth*, which has been always held particularly to enjoy the privileges of a barony; *vid. Skene ad leges burgorum cap.* 19. and that every baron may not only regulate the brewing of ale within his barony, but alſo prohibite the importation of ale brewed without the limits of his barony, is a principle incontroverted in the law of *Scotland.*

*Anſwered* for *Clunie* and others: The argument uſed on the part of the Magiſtrates proceeds upon a ſuppoſition manifeſtly erroneous, *viz.* that the erection of a royal borough implies in it the right of a barony, whereas in truth theſe grants differ widely both in their nature and in their effects: the erection of a barony is a grant in favour of the baron himſelf who is proprietor of the ground, and conſequently intitled to all emoluments thence ariſing: of this nature is the privilege implied in the common clauſe in charters *cum brueriis*, which privilege is ſo much the conſequence of property, that it will be carried, altho' not expreſſed, by a general grant of lands. The erection of a royal borough, on the other hand, is not of the nature of a private grant of property; royal boroughs are eſtabliſhed for the general benefit of the nation: both the eſtate and the freedom of the borough remain *inter regalia*, and may not be alienated: the bailies are the King's bailies, and every individual is the King's vaſſal in his burgage tenements. The terms of the grants from the crown to royal boroughs muſt determine the meaſure of their rights: and nothing, beſides what is eſſential to the conſtitution of a body corporate, is implied in them: thus we find in the *Leges burgorum ch.* 19. *Quod in burgo non debet audiri bloodwit, marchetæ, herezeld, nec aliquid de ſimilibus*, on which *Skene* obſerves, *hujuſmodi privilegia et immunitates pertinent ad barones, non ad burgenſes, niſi jus baronum et vicecomitum habeant ſibi conceſſum.* This ſhews that, in *Skene*'s opinion, neither the right of barony, nor that of ſheriff-ſhip is implied in the erection of a royal borough. It is confeſſed that the town of *Perth* has a right of ſheriffſhip, in virtue of expreſs charters to that effect; but that any of its charters contain a grant of barony, or of its privileges is a groundleſs averment: as to the caſe of the town of *Muſſelburgh*, it is not in point; for that town is by ſpecial charter erected into a barony.

" The Lords found that the Magiſtrates of *Perth* had no power to
" make the act purſued on, and therefore aſſoilzied the defenders
" and decerned." D

Act *J. Grant, J. Craigie, R. Craigie et Advocatus.* Alt. *Miller, Lockhart, Ferguſon.*
Reporter *Kilkerran.* Clerk *Pringle.*

The

N° XXVI. 8th *July* 1752.

## The CORPORATION of COOPERS in *Perth*, againſt *KEIR* and COMPANY.

THE corporation of coopers in *Perth* exhibited a complaint to the Magiſtrates of *Perth*, wherein they narrated, that one *Davidſon*, an unfreeman, had incroached on the privileges of their corporation, by making ſalmon-barrels within the borough, and concluded that he ſhould be prohibited from ſo doing in all time to come.

*Keir* and company (who had employed *Davidſon* as their ſervant) inſiſted that they, as freemen and burgeſſes, were intitled to deal in the ſalmon trade, and conſequently might either import barrels ready made, or employ within the borough whom they pleaſed in making them: "The Ma-"giſtrates nevertheleſs ſuſtained the complaint, and prohibited *Davidſon* "from working in the cooper work within the borough and liberty thereof "under the penalty of 5 *l. ſterling* for each tranſgreſſion."

Of this ſentence ſuſpenſion was obtained, and the caſe reported.

*Pleaded* for the chargers: Unfreemen are neither authoriſed by law nor cuſtom, to exerciſe within boroughs that craft which is peculiar to any of the corporations therein eſtabliſhed, although their employers be freemen and burgeſſes, and the work ſo made be intended for exportation: the exportation of ſalmon is a branch of trade by law appropriated to the freemen of royal boroughs, and the legiſlature intended alſo that the barrels, uſed in the package of ſalmon ſo to be exported, ſhould be made only by the coopers freemen in royal boroughs; hence when regulations, eſtabliſhing the ſize and form of ſuch barrels, were introduced, and the obſervance of theſe regulations was enforced by certain penalties, the execution of the law was committed to the magiſtrates of royal boroughs. This appears from act 33. Parl. 1. ſeſſ. 1. *Charl.* II. Now if the making of ſalmon-barrels by unfreemen be tolerated within a royal borough, it will be impracticable for the magiſtrates, or for the viſitors by them appointed, to enforce the obſervance of the regulations aforeſaid.

*Pleaded* for the ſuſpenders: That the chargers have the excluſive privilege of making ſalmon-barrels within the borough for ſale, is not diſputed: the ſuſpenders only contend, that they, as burgeſſes and guild-brethren, may carry on the fiſhing trade and export ſalmon: that, as a right to the *end* implies a right to the *means* alſo, they are intitled to import ſalmon-barrels from without the borough, or to employ their own ſervants, altho' not freemen, in making them within borough.

Thus a burgeſs, who has right to keep an inn within a borough, may, altho' no baker, bake the bread that is to be conſumed by his gueſts, and yet were he to do it for ſale without his inn, it would be juſtly deemed an incroachment on the privileges of the corporation of bakers: thus a craftsman, who, as a burgeſs, has right to keep an inn, may buy wine, altho' a foreign commodity, to be conſumed in his inn, and this without incroaching on that excluſive privilege of trading in foreign commodities which belongs to the corporation of merchants.

As to the act of Parliament on which the chargers found, it is anſwered, that the regulations therein expreſſed are general, and relate to the *whole*

*coopers*

*coopers within the kingdom*; and all ſuch whether freemen or not, whether reſiding within or without royal boroughs, are made ſubject to the penalties therein contained, if their work prove inſufficient: it is true that the act ordains *magiſtrates within the borough to put the act in execution*: but that plainly relates to what queſtions may ariſe within the borough: for the execution of the act is alſo committed to the Judge Ordinary, ſo that the whole that is intended is, that every judge ſhould execute the act within his own juriſdiction: and therefore no argument can be drawn from this act in ſupport of the ſentence given by the Magiſtrates of *Perth*.

Further, by indulging ſuch ample privileges to the corporation of coopers, the fiſhing-trade, and the exportation of ſalmon will be rendered more difficult and leſs beneficial: for in the preparing of ſalmon many things are required: they muſt be pickled, packed and barrelled up: now altho' it ſhould be granted that the coopers of *Perth* were ſufficiently ſkilled in the making of barrels, yet the pickling and packing of ſalmon is a diſtinct operation, and it would be highly inconvenient for the ſuſpenders to be obliged to employ the coopers of *Perth* in one branch of the work, and their own ſervants in another.

" The Lords ſuſpended the letters *ſimpliciter*." D

Act. *Lockhart*. Alt. *Ferguſon*. Reporter *Kilkerran*. Clerk *Gibſon*.

N° XXVII. 9th *July* 1752.

## REPRESENTATIVES of Mr. *DAVID COUPER*

againſt

## The other CREDITORS of *SKELBO*.

IN the ranking of the creditors of *Skelbo*, it was objected to *Couper*'s adjudication, that the ſummons of adjudication was executed before the days of ſpecial charge were elapſed, and therefore not regular. The Lord Ordinary " ſuſtained the objection relevant to poſtpone the ſaid adjudica-" tion to ſuch adjudications as were regularly led upon ſpecial charges."

*Pleaded* in a reclaiming petition for the repreſentatives of *Couper*: The act of ſederunt of the 18th *February* 1721, which prohibits the raiſing and executing any ſummons of adjudication within the days of ſpecial charge, ſeems only to relate to adjudications poſterior in date to it: for that the act 106. Parl. 7. *Ja.* V. till explaned by the act of *ſederunt*, was not clear as to this point: it does not ſay that the days of ſpecial charge muſt be expired, before letters of appriſing can be directed, but only, *that letters ſhall be directed, charging to enter within forty days next after the charge, and failzeing thereof, letters ſhall be directed to appriſe*; which words might have been thus interpreted, that, after a charge to enter heir, letters might be immediately directed to appriſe; which however could only be carried into execution, if the perſon charged ſhould fail to enter within the forty days: nor is this more inconſiſtent with the nature of the thing, than is that daily practice which makes the days of a general charge, and the days of the *annus deliberandi* to run on together.

" The Lords refuſed the petition without anſwers, and adhered." D

Petit. *D. Græme*.

N° XXVIII. 14th *July* 1752.

*ROBE* Supplicant.

*ROBE* keeper of the priſon of *Edinburgh*, petitioned the Lords, that he might be authoriſed to detain a criminal under ſentence of tranſportation, until payment of the priſon dues ſhould be made. The Lords were of opinion, that, by indulging this privilege to jailors, every corporal puniſhment, inflicted by law, might be evaded, and therefore,

" They refuſed the petition." D

Petit. *And. Macdouall.*

N° XXIX. 17th *July* 1752.

*ANDREW CLERK*

againſt

*JAMES WADDEL.*

IN a competition of adjudgers, it appeared that the execution of *Waddel*'s ſummons of adjudication concluded in the following manner, *viz.* " This I did after the form and tenor, *&c.* whereof I affixed and left a " copy, *&c.* which copy was ſubſcribed by me, and did bear the day " and date of the affixing thereof, witneſſes names and deſignations " therein inſerted, and hereto ſubſcribing, which are *James Nielſon* and " *John Young* fleſhers in *Falkirk*; and for the more verification hereof, " I, and the ſaid witneſſes have ſubſcribed the ſamen, *&c.*

Upon this it was *objected*, That, altho' the execution bears the ſubſcription of the witneſſes, yet it does not certify that they were preſent when the citation was given by affixing, *&c.*

*Anſwered*, The words above-recited ſufficiently imply that the witneſſes were preſent.

The Lord Ordinary repelled the objection, and, on a reclaiming petition,

" The Lords adhered to his interlocutor, and refuſed the deſire of " the petition." S

Act. *Alex. Lockhart.* Clerk *Kirkpatrick.*

N° XXX. 23d *July* 1752.

*MARGARET OLIPHANT*

againſt

His MAJESTY'S ADVOCATE.

BY contract of marriage dated in the year 1719, betwixt *Laurence Oliphant* of *Gaſk* and his wife, it was provided, " That, in conſideration " the eſtate of *Gaſk* ſtood entailed to the heirs male of the body of the " ſaid *Laurence*; which failing, to the other heirs male; and that there- " by the daughters were excluded; therefore the ſaid *Laurence* binds him- " ſelf and his heirs, that failing heirs male of that marriage, who ſhould " ſucceed to and enjoy the eſtate, ſo that the ſame ſhould deſcend to an- " other

" other heir male, then, and in that caſe, to provide the daughters of that " marriage thus, *viz.* if two or more, to 25000 merks, *&c.* payable at the " ages of ſixteen or marriage, *&c.*"

Of this marriage there was iſſue, a ſon, and *Margaret* and *Janet* two daughters.

*Laurence* and his ſon, having joined in the rebellion 1745, were attainted. Whereupon *Margaret* and her huſband claimed, 1*mo*, the ſums in the contract of marriage, in caſe the ſon ſhould happen to die before his father; and *pleaded*, that, as the father could not diſappoint her of this conditional debt by a voluntary deed diſponing the eſtate, ſo neither could he diſappoint her by his crime.

*Anſwered* for his Majeſty's Advocate, The condition of this debt was, that " in caſe there ſhould be no ſon of this marriage who ſhould ſucceed to " the eſtate of *Gaſk*, then it ſhould go to the other heirs male." But this condition never can exiſt; for altho' the ſon were dead, yet, as the eſtate is forfeited, no other heir male can ſucceed. It is abſurd to ſay, that, becauſe the ſon cannot ſucceed, therefore the daughters are intitled. The forfeiture of the eſtate affects the right of the whole iſſue of *Laurence*. He could have contracted debt on the eſtate to have been preferable to this proviſion: therefore his forfeiture will barr this proviſion.

" The Lords diſmiſſed this part of the claim."

*Margaret*'s ſecond claim was founded on the following facts. In the year 1731, her father *Laurence* granted a bond for 9000 merks to *James Oliphant* his father; who, of even date, aſſigned the ſame to the ſaid *Margaret* and *Janet*. The aſſignation contained this clauſe, *viz* " with power alſo to " the ſaid *Laurence*, if he ſhall find reaſonable cauſe, to diſappoint his ſaid " two daughters, and ſettle the above ſums upon any one of them, or " upon all or any other of his children; but always ſo, that the ſame " ſhould be ſettled upon any one of the children, one or more procreate " betwixt him and his ſaid ſpouſe." The ſubſcriptions to the ſaid bond of 9000 merks and aſſignation thereof were afterwards cancelled, altho' it was not known by whom.

In the year 1739, *Laurence* granted two bonds of proviſion, the one to his daughter *Margaret* of 10,000 merks, payable at her marriage or his own death; and the other to *Janet* of 9000 merks, under this proviſion, that, in caſe of her death before himſelf, or before her marriage, 5000 merks thereof ſhould accrue to *Margaret*. And each of theſe two bonds contained a clauſe, making them revokable at the pleaſure of the granter.

Whereupon *Margaret* claimed, 2*do*, her proportion of the ſaid bond of 9000 merks granted by her father, and aſſigned to her by her grandfather. She produced a letter of the ſame date with the bond and aſſignation, ſent by her ſaid grand father to her mother, recommending to her *to be careful of the incloſed writs*; which, altho' they are not named in the letter, the claimant contended could be no other than the ſaid bond and aſſignation. If this was doubted, ſhe offered proof by her mother's oath. Upon this ſhe *pleaded*, that it was a preſumption, her father, upon his executing the ſaid new bonds of proviſion in the 1739, had cancelled the ſubſcriptions of the ſaid old bond and aſſignation. This ſhe contended he had no power to do; altho' ſhe allowed that, by the clauſe above mentioned, he had power to have given the ſum to any other child of the marriage. In caſe this claim ſhould be allowed, ſhe is ſatisfied that it ſhould be deducted out of the ſaid new bonds of proviſion.

*Anſwered:*

*Anſwered:* This bond and aſſignation were cancelled, therefore could not be the foundation of a claim, and there was no evidence the father had done it. 2*do*, Altho' the father had done it, he had power ſo to do in virtue of the clauſe above mentioned; ſeeing the cancelment was a virtual aſſignation to the eldeſt ſon who was a child of the marriage; and by his forfeiture it fell to the crown.

" The Lords alſo diſmiſſed this claim."

*Margaret* claimed, 3*tio*, her intereſt in the new bonds of proviſion dated in the 1739. For that, in the firſt place, the clauſe making them revocable at the father's pleaſure, being a perſonal faculty, could not be tranſmitted to the crown by the *forfeiture*. The like had been uniformly determined by the courts in *England*, and had been followed in many caſes adjudged in *Scotland* after the rebellion 1715; particularly in the caſes of the late Earl of *Nithſdale*, of the Earl of *Panmuir*, of the children of *Stirling* of *Keir*, and of the children of *Scrymgeor* of *Bowhill*. In the next place, if it ſhall be allowed that theſe new bonds came in place of the cancelled bond, they muſt be conſidered as granted for a valuable conſideration. If ſo, as *Laurence* had no power to deprive the claimant and her ſiſter of their right in that old bond, the power of revocation in the new bonds muſt be held *pro non adjecto*.

*Anſwered*, 1*mo*, Theſe new bonds do not appear ever to have been delivered; therefore, without reſpect to the power of revocation, they cannot be conſidered as debts binding the forfeiting perſon, or which might have affected his eſtate on the day mentioned in the veſting act.

With reſpect to faculties of revocation paſſing to the crown by forfeiture, it is to be obſerved, that, in all the caſes mentioned for the claimant, conveyances had been made to third parties, and poſſeſſion had followed upon them: but the caſe here is quite different: the bonds in queſtion never were delivered; ſo there was no right transferred to the claimant, and therefore there was no neceſſity of a revocation. Were the claimant's doctrine to be eſtabliſhed, all forfeitures could eaſily be eluded.

2*do*, There is no proper evidence of the father's having cancelled the old bond, and of the new bond's having been granted in lieu of it. But further, tho' this were made out, it would not ſupply the want of delivery.

The Lords ſeemed to think, that, as theſe new bonds never were delivered, and were revocable, they did not bind the forfeiting perſon at the time of the forfeiture.

" They diſmiſſed alſo this claim." S

Act. *Ja. Ferguſon, David Græme.* Alt. Lord Advocate, *And. Pringle.* Clerk *Gibſon.*

N° XXXI. 24th *July* 1752.

## *PITCAIRN*
againſt
## *LUNDIN.*

IN the year 1707, *Robert Lundin* granted a bond for 400 merks, to which *Anne Pitcairn*, the purſuer, obtained right by progreſs. Upon this bond

bond ſhe ſued *James Lundin* of *Lundin* his ſon, and ſet forth, that *Robert* poſſeſſed the eſtate of *Lundin* for more than three years, and was, during that time, apparent heir: that therefore the defender is liable to pay his debts to the extent of the value of the eſtate, in purſuance of act 1695, *Will. Seſſ.* 5. *cap.* 24.

The defender ſet forth, That, by contract of marriage between *Sophia Lundin* his grandmother, and *John Drummond* afterwards Earl of *Melfort*, *Margaret Lundin*, mother to *Sophia*, ſettled her eſtate upon the wife and huſband, and longeſt liver of them, and the heir-male procreated betwixt them; with a long ſeries of heirs, under a ſtrict entail: that, upon this ſettlement, a charter under the great ſeal was expede in 1674, and *Sophia* and her huſband were infeft: that, in the year 1695, the Earl of *Melfort* was attainted of high treaſon by the Parliament of *Scotland*, with a ſalvo, that the attainder ſhould not taint the blood of his children by the ſaid *Sophia*: that *James Lundin*, eldeſt ſon of the ſaid marriage, received from the crown a right of the ſaid eſtate as ſuppoſed to be forfeited by his father's attainder: that, upon *James*'s death, *Robert* his brother was ſerved heir in ſpecial to him, and infeft: that it came afterwards to be diſcovered, that only the liferent of the eſtate of *Lundin* was in the Earl of *Melfort*; and, therefore, that no more than the liferent was forfeited to the crown. Whereupon *Robert*, in 1707, obtained a new grant from the crown of the Earl of *Melfort*'s liferent; and, by virtue thereof, poſſeſſed the eſtate until the Earl's death in the 1714, and thereafter continued his poſſeſſion until his own death in the 1716.

*John*, the eldeſt ſon of *Robert*, being adviſed, that no other right was veſted in his father than the Earl of *Melfort*'s liferent, made up his titles as heir to *Sophia* his grandmother. Upon his death, *James* his brother, the defender, was in like manner ſerved heir to him, and infeft.

Upon this ſtate of the facts, the ſaid defender, without producing or founding upon the entail in the contract of marriage, *pleaded*, That his father *Robert*'s poſſeſſion during the Earl of *Melfort*'s life was not as apparent heir, but as donee of the Earl's liferent: the poſſeſſion in that period was the poſſeſſion of the liferenter: *Robert* the granter of the bond was in the ſituation of an apparent heir, who had got a leaſe from an univerſal liferenter, and had poſſeſſed in virtue thereof.

*Replied* for the purſuer, That, admitting the facts with reſpect to the forfeiture to be true, *Robert* was certainly apparent heir, and did poſſeſs the eſtate for upwards of three years: if ſo, his obtaining a collateral right would not exempt him from falling under the deſcription of the ſtatute: that this ſtatute ought to be beneficially interpreted in favour of creditors. The other clauſes of it make poſſeſſion of the predeceſſor's eſtate, by any other right than as purchaſer at a public roup, an univerſal paſſive title againſt the apparent heir with reſpect to his predeceſſor's debts. It is therefore not ſuppoſeable, that the firſt clauſe would intend to give ſo eaſy an evaſion of the apparent heir's own debts, where only a limited paſſive title is incurred.

It was obſerved on the bench, that an apparent heir would be liable on the ſtatute, under whatever title he might poſſeſs, provided there was acceſs for him to poſſeſs as apparent heir. But here there was no ſuch acceſs.

*Found*, " That the poſſeſſion of *Robert Lundin*, the immediate heir, " during the ſubſiſtence of the forfeiture of the Earl of *Melfort*'s " liferent, cannot be brought *in computo* of the three years



" poſſeſſion;

" poſſeſſion; reſerving to parties to be heard how far he poſſeſſed
" for three years after the expiration of the liferent. s

Act. *Alex. Lockhart.* Alt. *Ro. Craigie.* Clerk *Gibſon.*

No XXXII. *26th July* 1752.

*ARCHIBALD CAMPBELL* late Merchant in *EDINBURGH*,

againſt

Lord *MONZIE* and *JOHN CAMPBELL* of *Auchalader.*

THE deceas'd *Archibald Campbell* Miniſter of the goſpel at *Weem*, by a deed bearing date in the 1736, mortified certain ſums for the payment of yearly ſalaries to three additional ſchool-maſters, to be eſtabliſhed within the ſaid pariſh, at the places mentioned in the deed. And for carrying this part of his will into execution, he veſted the ſums in Lord *Monzie*, *John Campbell* of *Auchalader*, and three other perſons, and their heirs and ſucceſſors, in their lands and eſtates, as truſtees and adminiſtrators for the uſe and behoof of the ſaid ſchool-maſters; with power to the ſaid truſtees and their foreſaids, or major part of them who are thereby declared a *quorum*, to aſk, uplift, and receive the debts and ſums thereby aſſigned, and to apply and ſecure the ſame for the purpoſes of the ſaid mortification.

Lord *Monzie* and *Auchalader* accepted of this truſt, uplifted the defunct's funds, and ſettled the three ſchools in terms of the will.

Thereafter, an action of compt and reckoning was brought againſt them by *Archibald Campbell*, nephew, heir, and executor of the defunct; in which the defenders charged themſelves with the defunct's money intromitted with by them, and took credit for 6000 merks laid out for behoof of the three ſchool-maſters, in terms of the defunct's will.

It was objected for the purſuer to this article of their diſcharge, That, one of the truſtees being dead, and two of them having declared, under their hands, that they are reſolved not to accept of the truſt; conſequently, the defenders who are not a *quorum* of the five truſtees have no power to ſettle the ſchools, but muſt denude or make payment to the purſuer of the ſums contained in their charge.

*Anſwered* for the defenders, 1*mo*, The mortification was what the defunct had chiefly in view in his ſettlement. He named the truſtees, in order to carry it into execution, but not to enable them to defeat his will, by declining to accept of the truſt.

2*dly*, It is a general rule in the conſtruction of ſettlements, to take place after death, that powers of adminiſtration, thereby devolved, are interpreted in as extenſive a manner as the words can admit of, that ſo the defunct's will may not periſh, or the execution thereof devolve upon others than he himſelf inclined to truſt. *Stair*, *lib.* i. *tit.* 10. § 13. Many deciſions have been given agreeable to this opinion; particularly 14th *Feb.* 1672, *Elies* againſt *Scot*; and 11th *Feb.* 1676, *Turnbull* againſt *Rutherford*; in both which caſes, five tutors had been named, and the nomination was found effectual, tho' only two had acted in the firſt caſe, and no more but one in the other. Even where a *quorum* has been named, the failure of the *quorum* has been found, in ſome caſes, not ſufficient to ſo-

pite

pite the nomination, tho' it muſt be owned the deciſions have not been uniform upon this point. *Dictionary*, *vol.* 2. *p.* 384. But in the preſent caſe, there is no occaſion to carry the point ſo far, for the defunct has not limited any preciſe number to be a *quorum*, but has devolved the whole powers *upon the truſtees, and their heirs, and major part of them who are declared a* quorum. This major part muſt be applied to ſuch of the truſtees as incline to accept and act under the ſettlement. The condition of acceptance is implied in the ordinary ſtyle of ſuch nominations, and it cannot be a reaſon for inducing a different conſtruction, that the teſtator has declared the majority a *quorum*. And ſo the Lords decided, in a ſimilar caſe, 15th *July* 1680, the Hoſpital of *Largo* againſt the Earl of *Weemyſs*.

But, *tertio*, Suppoſing the nomination altogether to have failed, yet this failure cannot have ſo ſtrong a conſequence as totally to fruſtrate the will of the defunct. This would be, in other words, to maintain that the defunct intended the ſettlement of theſe ſchools ſhould depend, not upon his own will, but upon the will of the truſtees, who, by refuſing to act, would have it in their power to take away this ſum from the pious uſe to which it was deſtinated, and give it to the purſuer. And if the Lords ſhould be of opinion, that the powers of the truſtees are at an end, they will, no doubt, lay down ſome proper method for carrying the defunct's will into execution, as they did in a late caſe of a mortification, left by Mr. *Gilbert Ramſay* to the corporation of *New Aberdeen*.

" The Lords found, That the deed of mortification in queſtion does not
" fall nor become void through the failure or repudiation of the ma-
" jority of the truſtees, and that though there ſhould be only one
" of them ſurviving and not renouncing he may accept, and is inti-
" tuled to act; and further found, That the ſaid mortification does
" not fall even by the failure or renounciation of the whole truſtees,
" but that in that caſe it is competent to this court, to nominate and
" appoint ſuch perſon or perſons as they ſhould think fit, for carrying
" the ſaid deed into execution. M

Act. *Geo Pringle.* Alt. *Ja. Ferguſon.* Reporter *Elchies.* Clerk *Kirkpatrick.*

No XXXIII. 30th *July* 1752.

*JOHN LESLY* of *LUMQUHAT*

againſt

*WILLIAM HUNTER* BLEACHER at *Leven.*

*GEORGE* and *Archibald Arnots*, weavers, in ſpring 1749, ſent a parcel of cloth to *William Hunter* to be whitened; and when this parcel was whitened, they brought a ſecond parcel of cloth to be whitened alſo, marked with their names and uſual marks; and they promiſed to pay the prices for whitening both parcels when they got away the ſecond. Upon the faith of this, *William Hunter* delivered to them the firſt parcel. Soon after this the *Arnots* failed in their circumſtances, and left the country. *John Leſly* of *Lumquhat* claimed two pieces of the ſecond parcel of cloth, and as *Hunter* refuſed to deliver them unleſs he received payment for bleaching both parcels, Mr. *Leſly* brought a proceſs againſt

gainſt him before the Juſtices of Peace for delivery: and, having proved the property of the ſaid two pieces, the Juſtices "decerned the defend-"er to deliver to the purſuer the two pieces of cloth on payment of the "price of bleaching the ſame."

*William Hunter* ſuſpended, and inſiſted, That as the ſaid two pieces were delivered to him as the property of the *Arnots*, and marked with their names and uſual marks, he was intitled to retain the ſame till he was paid the account for bleaching of both parcels of cloth; for it was on account of the ſecond parcel's being impignorated for the price of bleaching both that he delivered up the firſt parcel; and as poſſeſſion of moveables preſumes property, he was bound to inquire no further, but might reaſonably rely on the ſecurity of the ſecond parcel; and there was here no *furtum*, or *vitium reale*, in virtue of which Mr. *Leſly* could pretend to ſeize the cloth from one who held it for ſo onerous a cauſe.

*Anſwered* for Mr. *Leſly*, That the preſumption of the cloth's belonging to the *Arnots* muſt yield to the truth, Mr. *Leſly* having proved it to be his property; and it was not in the power of the *Arnots* to take the property of his cloth from him, or lay a burden thereon without his conſent. The *Arnots* put their names in his cloth without his knowledge, and if they have thereby deceived the ſuſpender, and induced him to give up the firſt parcel, each piece of which he might have retained till payment of the bleaching thereof; he has himſelf to blame for truſting them, but that cannot prejudge a third party.

"The Lords found the letters orderly proceeded." B

Act. *Dav. Græme.* Alt. *Ja. Erſkine.* Clerk *Murray.*

No XXXIV. 15th *November* 1752.

## *ANDREW MACREADIE*
&
againſt
the Executors of *JAMES MACFADZEAN.*

*JANET Macreadie*, in her contract of marriage with *James Macfadzean*, does, "with advice and conſent of Provoſt *Macreadie*, her "father, convey to her huſband, all and ſundry lands to which ſhe has "now right, and to which ſhe may hereafter ſucceed, in virtue of any "deed made by her ſaid father to her, or to any other of his children." And further, "ſhe makes her ſaid huſband and his aforeſaids her ceſſion-"ers and aſſignies in and to all debts due to her, and in and to the "whole writs concerning the ſubjects before diſponed, both heretable "and moveable; and all and every other writ conceived, or which may "be interpreted to be conceived in favours of her, the ſaid *Janet*."

About a month after this contract of marriage, Provoſt *Macreadie* aſſigned a bond of 500 *l.* to *Janet* and *Margaret Macreadies*, his then only ſurviving daughters, "equally between them; and failing either of them "by deceaſe, without heirs of their bodies, or conveyance in a contract "of marriage to the ſurvivors of them." And in the ſame deed he made his ſaid daughters his executors and univerſal legataries. After Provoſt *Macreadie*'s death, upon a recital of her ſaid contract of marriage, conveyed

conveyed to her husband her half of her father's executry, and also of the said bond of 500 *l.* Soon thereafter, *Janet* died without issue; and her husband died after her.

*Margaret Macreadie* assigned the whole sum in the bond of 500 *l.* to *Andrew Macreadie* her brother, and soon thereafter she died. After her death, a competition arose between the said *Andrew Macreadie* and the executors of *James Macfadzean*, for *Janet Macreadie*'s half of the bond of 500 *l.*

*Argued* for *Andrew Macreadie*, That the mutual substitution of the two sisters in the assignation to that bond, in case of *their dying without heirs of their bodies, or conveyance in a contract of marriage*, barred both of them from gratuitous alienation.

*Answered* for the executors of *James Macfadzean: 1mo*, The contract of marriage expressly contains *acquirenda* in heritable subject, and the words of it cannot well be taken in a more limited sense as to moveables: therefore, that contract alone must carry *Janet*'s half of this bond. The Provost must undoubtedly have considered the contract in this light: for he could never mean to disable *Janet*, to dispose of this sum, unless her husband should die and she should marry again: this would have been to put *Janet*, who had married with his consent, in a worse situation than *Margaret* who was unmarried, and who might make an unequal match.

*2do*, The substitution of the two sisters is simple, and each of them is made fiar of one half of the bond. The case is very different from such where there is a clause of return to the granter.

The Court did not seem to lay any stress upon the general assignation in *Janet*'s contract of marriage, but considered her after-conveyance to her husband as gratuitous. They held, that the mutual substitution of the daughters implied a limitation on them not to alien; and that it was plain the father meant this, by his making the exception of *alienating in a contract of marriage*; for, *inclusio unius est exclusio alterius.* In the next place, as *Janet* was married when the father made this limitation, it was also plain, he did not intend the sum should go to her husband in the marriage then subsisting. This would imply a contradiction in the substitution: for how could there be a substitution of *Margaret* to *Janet*, if *Janet's* sum was intended to be instantly conveyed to her then husband?

" The Lords preferred *Andrew Macreadie* as assigney by his sister *Mar-*
" *garet* to the whole sum in the bond in question. S

Act. *Alex. Boswel.* Alt. *And. Macdoual.* Clerk *Kirkpatrick.*

N° XXXV. 23d *Nov.* 1752.

*GABRIEL HAMILTON* of *Westburn*

against

the MINISTER and Kirk-Session of *Cambuslang.*

THE pursuer brought his action as an heretor of this parish, against the Minister and kirk-session, for exhibition of the accompts and compt-books of the money and funds belonging to the poor of said

 parish;

pariſh; with a concluſion, that, in caſe it ſhould appear that the defenders had miſapplied the poor's money, to other ends and purpoſes than the law directs, they might be decerned to repeat the ſame to ſuch perſons as the Lords ſhould appoint, for behoof of the poor.

Upon production of the accounts, the following articles appeared ſtated to the diſcharge of the poor's money;

1. To a new tent for the field-preachings.
2. To the expence of repairing ſaid tent from time to time.
3. To communion forms, tables, and table-cloaths.
4. To rent for a preaching-field.
5. To conſtables and officers for attending to keep the peace at the ſacrament.
6. To damages done to an heritor's dike, adjacent to the preaching-field.
7. To the preſbytry and ſeſſion-clerks.

To theſe it was objected for the purſuer, That they were all miſapplications of the poor's money, and could not be allowed to the Miniſter or kirk-ſeſſion, as proper articles of diſcharge of that fund.

*Anſwered* for the defenders: The Miniſter and kirk-ſeſſion, as well in their legal capacity of adminiſtrators of the poor's money, as from the implied conſent of the charitable givers, have ſome diſcretionary power in the adminiſtration and diſpoſal of what is collected at the places of publick worſhip within the pariſh. All the articles except the laſt were occaſioned by the extraordinary confluence of people to this pariſh to attend divine ordinances: and as the benefit which aroſe from thence to the poor of the pariſh has been very great, it is highly reaſonable that the expence of providing what was neceſſary for ſuch publick ſervices, ſhould burden thoſe who had the only pecuniary benefit from them.

The ſmall ſalary given to the ſeſſion-clerk, for his trouble in keeping the books and accounts relating to the poor's money, is alſo a natural burden upon that fund. And what was paid to the preſbytry-clerk, is agreeable to the practice of moſt pariſhes in *Scotland*, there being no other fund for the payment of this petty ſalary.

*Replied* for the purſuer: The poor of a pariſh have a *jus quæſitum* to the money that is collected for their uſe; and the heritors, who are by law burdened with the ſupport of the poor, are but ſubſidiarly liable, in ſo far as the poor's proper funds fall ſhort. The church, and churchyard might have anſwered all the purpoſes of publick worſhip to the pariſhioners and others who reſorted there for religious ſervice; and it is unreaſonable to charge the poor's money with an expence which might have been ſaved, if too much encouragement had not been given to the aſſembling of mobs of people, to the diſhonour of religion, and the real hurt of the country.

It occurred as a doubt to ſome of the Lords, whether this action was competent to one ſingle heritor of the pariſh.

" The Lords found, That it is competent to one heritor to bring a pro-
" ceſs againſt the kirk-ſeſſion, for accounting for their management
" of the poor's money, ſuſtained the defence as to the articles laid
" out for the purchaſe and after repairs of the tent; and alſo, the
" articles paid to the ſeſſion-clerk: and found that the ſalary paid to
" the preſbytry-clerk was illegal; but, in reſpect of the univerſal cu-
" ſtom, found that the defenders are to have allowance thereof for
" time

" time by paſt, but not in time coming, and repelled the defences as " to the haill other articles, and ordained the balance in the defenders " hands, after deduction of what is above allowed to be paid to " the poor's box of the pariſh; and decerned againſt the defenders, " conjunctly and ſeverally, for payment thereof, and ordained dili- " gence to paſs to that effect againſt the defenders, at the inſtance " of the purſuer, or any of the heritors of the pariſh. M

Act. *Lockhart.* Alt. *Craigie & Macintoſh.* Clerk *Pringle.*

## N° XXXVI. 24th *November* 1752.

Captain *HAMILTON BLAIR*, of *Blair*

againſt

*LAURENCE SCOTT* of *Bavilaw* and his Curator, *ad litem.*

THE lands and eſtate of *Kerſland*, with *the teinds, parſonage and vicarage thereof*, were brought to a judicial ſale, before the Lords, at the inſtance of a creditor upon the eſtate, by an adjudication which adjudged both lands and teinds; and *William Blair* of that ilk was called as a defender in the proceſs; and in the year 1738, *William Scott* of *Bavilaw* became purchaſer of the lands and teinds, as expoſed to ſale before their Lordſhips.

Captain *Hamilton Blair* of *Blair*, as patron and titular of the teinds of the pariſh of *Dalry*, within which the lands of *Kerſland* lie, brought an action againſt *Laurence Scott*, ſon and heir of *William Scott*, the purchaſer of *Kerſland*, for payment of the bygone teinds of theſe lands ſince the time of the purchaſe. Sundry objections were moved to the purſuer's title, which being over-ruled.

It was *pleaded* for the defender, That the title under which the ſale proceeded, contained the teinds, parſonage, and vicarage of the whole lands, and the decreet of ſale adjudges and diſpones to the purchaſer, the lands, with the teinds, parſonage and vicarage; and therefore, had he continued to poſſeſs the teinds under this title for forty years, he would have acquired an abſolute right to the teinds by poſitive preſcription: and, as the defender has poſſeſſed the teinds for twelve years before the date of this action, he is intitled to plead that he is a *bona fide* poſſeſſor, and that they are *fructus bona fide percepti et conſumpti*, more eſpecially that the purſuer's predeceſſor was called in the proceſs of ſale, and, during a dependance of 11 years, made no claim to the teinds, but allowed them to be uplifted with the ſtock, and applied for payment of the creditors.

*Anſwered* for the purſuer, It is impoſſible to plead a *bona fides* without a title, far leſs contrary to the expreſs tenor of the title. In this caſe the teinds could not be ſold, becauſe there was no ſort of title to the teinds in the perſon of the common debtor; and the creditors only inſiſted that the uſual value ſhould be put upon the heritor's privilege of purchaſing his own teinds, as appears from the firſt article of roup. And that *William Scott*, the purchaſer, well underſtood that the teinds did not fall under his purchaſe, appears from a petition given in by him to the Court relative to the purchaſe; and as to the adjudication upon which the

the ſale proceeded, wherein the teinds are comprehended, it is only conveyed to *Bavilaw* for ſecurity of his purchaſe, which was not of the teinds, but only of the privilege of buying the teinds, and ſo far he has right to the adjudication, and no further. The decreet of ſale is his cardinal title, and beyond it he cannot plead a *bona fide* poſſeſſion.

*Replied* for the defender, The article of roup, referred to by the purſuer, proves that the creditors had not recovered a ſufficient title to the teinds in the common debtor, and that they did not chuſe to riſk an abatement of the price which might be demanded by the purchaſer upon this account; but, if ſuch title had been found after the ſale, this precaution of the creditors would have been no objection to the purchaſer's claiming the heritable right of the teinds: nor would there have been any objections to the purchaſer's acquiring a right by preſcription, and therefore, till a better right was produced, he was *bona fide poſſeſſor* of the teinds, as well as of the lands; and if, in an any caſe, a *bona fide* poſſeſſion is pleadable, it is in the caſe of teinds: for, if the titular had made his claim, the heritor could have redeemed himſelf by payment of ſix or nine years purchaſe, whereas, by ſecreting his right, as in the preſent caſe, he ſubjects the heritor to twenty years purchaſe of his teinds, ſo that the titular's delay ought to prejudge himſelf and not the poſſeſſor.

"The Lords repelled the defence of *bona fides*, in reſpect of the anſwers." M

Act. *Tho. Hay.* Alt. *Miller & Craigie.* Clerk *Kirkpatrick.*

No XXXVII. 28th *November* 1752.

## *LILIAS WEIR*
againſt
## *COLIN DRUMMOND.*

*MARGARET Pringle* made a ſettlement, whereby ſhe diſponed to *Lilias* and *Mary Weirs*, (her nieces and heirs at law), equally betwixt them, and the heirs of their bodies; and failing of any of them by deceaſe, without heirs of her body, to the ſurvivor of them two, and the heirs of her body; whom failing, to Mr. *Archibald Murray* Advocate, and to his heirs and aſſigns whatſoever, heritably and irredeemably, all and ſundry, lands, tenements, and hereditaments, *&c.* belonging to her. By the ſame deed ſhe aſſigned her perſonal eſtate, two thirds to *Lilias*, and one third to *Mary*, with like ſubſtitution. The deed contained this expreſs declaration, That it ſhould not be in the power of the ſaid *Lilias* and *Mary Weirs*, or any of them, to alter or prejudge the order of ſucceſſion to the ſubjects diſponed. The two ſiſters ſigned this deed as conſenters.

*Mary* married *Colin Drummond*, and, by poſtnuptial articles of marriage, *Colin Drummond* became bound, in contemplation of the marriage, to diſpone to himſelf and the ſaid *Mary Weir*, in conjunct fee and liferent, all lands and ſums of money, *&c.* preſently pertaining to him, or to which he ſhould ſucceed during the ſtanding of the marriage, and to the children of the marriage in fee, whom failing, to the ſaid *Colin Drummond*,

*mond*, his heirs or aſſigns whatſoever. Upon the other part, *Mary Weir* obliged herſelf to diſpone all her lands, ſums of money, *&c.* which ſhe had, or might ſucceed to, during the ſtanding of the marriage, to herſelf and her ſaid huſband, in conjunct fee and liferent, and to the children of the marriage in fee; whom failing, to her children of any future marriage; whom failing, to the ſaid *Colin Drummond*, his heirs or aſſigns whatſoever in fee. *Mary Weir* died without iſſue.

The queſtion came to be, whether *Mary Weir*'s proportion of *Margaret Pringle*'s eſtate ſhould belong to *Lilias Weir* in virtue of the ſubſtitution, or to *Colin Drummond*, in virtue of the marriage articles?

*Argued* for *Lilias Weir*, The granter was under no natural obligation to provide: her intention to convey the ſubjects to the ſurvivor of the two ſiſters in the event of the others dying without iſſue, and to Mr. *Murray* failing iſſue of both, is clear; and this is enforced by an expreſs prohibition, not to alter the order of ſucceſſion: therefore *Mary* could not gratuitouſly alien. 2*do*, The contract of marriage was poſtnuptial, and was at leaſt gratuitous, ſo far as to Mr. *Drummond*'s preſent claim. The conveyance in the marriage contract is general; and all general conveyances are with burden of the granters debts and obligations: therefore this conveyance muſt be burdened with the ſubſtitution, which was a debt on *Mary Weir*, and to which ſhe had expreſsly concurred.

*Laſtly*, The Court, in ſimilar caſes, hath determined for the ſubſtitution, *viz.* theſe of *Napier* and *Johnſton* againſt Lady *Logan* 1740; *Beatſon* of *Kelry* againſt *Lumſdain* and *Beatſon*, *July* 1747; and *Houſton* againſt *Groſets* of *Logie*, 11th *July* 1732.

*Argued* for *Colin Drummond:* Tailzies are not ſuch favourites of the law as to be created by implication. By this ſubſtitution, the only reſtraint upon the ſiſters is not to alter the order of ſucceſſion; there is no reſtraint whatever upon them from alienating *actu inter vivos*. The reſtraint from altering the ſucceſſion, and the reſtraint from alienating, are diſtinct and different reſtraints; the one is not to be extended to the other. *Mary* might therefore gift; much more might ſhe alien in a contract of marriage, which, tho' poſtnuptial, was equal and onerous. Neither does it make any difference, that the alienation ſhould conſequentially alter the order of ſucceſſion, as the Court has determined in many caſes. 2*do*, The intention of taking the two ſiſters bound as conſenters in the deed of ſettlement, was no other than to bar reduction *ex capite lecti*, the granter being then on death-bed. At any rate, that conſent could never have barred either of them from ſettling their eſtates in a contract of marriage.

*Laſtly*, as to precedents, the Court hath not always been uniform in this point, yet the courſe at preſent, is, in ſimilar caſes, intirely againſt limitations; as witneſs, among others, that of the heirs of Provoſt *Wightman* againſt the repreſentatives of *Anderſon*, 1746. As to the caſes quoted for *Lilias Weir*, they do not ſeem to be ſimilar; for in the two firſt there was a clauſe of return to the granter, in caſe the granter ſhould die without iſſue; this made the grant conditional: but here the grant is ſimple. In the third caſe, the alienation was made in a teſtament, which is a deed gratuitous: but here the alienation is made in a marriage contract, which is, in every caſe, an onerous deed.

" The Lords found the ſubjects in queſtion were properly conveyed by " *Mary Weir* to *Colin Drummond* by the contract of marriage betwixt " them." S

Act. *Ro. Craigie.* Alt. *Alex. Lockhart, & Advocatus.* Clerk *Gibſon.*

N° XXXVIII. 28th *November* 1752.

Mr. *JOHN GOLDIE*

againſt

The TENANTS of *Maiſon-Dieu.*

THE King was pleaſed to grant unto Mr. *John Goldie*, Profeſſor of Divinity in the univerſity of *Edinburgh*, the lands of *Maiſon-Dieu*, which were ſuppoſed to have fallen to his Majeſty as *ultimus hæres*.

In conſequence of this gift, Mr. *Goldie* raiſed a declarator of his right, wherein he called *Murray* of *Cherrytrees*, who ſtood infeft in the lands of *Maiſon-Dieu*, under a diſpoſition from the laſt proprietor. *Cherrytrees* appeared, and offered objections to Mr. *Goldie*'s right and defences in ſupport of his own, but died while the cauſe was yet in dependance. The action having been transferred againſt his eldeſt ſon, he refuſed to enter heir or to defend: decreet was then given in favour of Mr. *Goldie*, after which he inſiſted againſt the tenants of *Maiſon-Dieu* in an action of mails and duties.

The tenants *objected*, That the decreet was not *in foro contradictorio*, not againſt the father, becauſe he died before it was pronounced; not againſt his ſon, becauſe he refuſed to enter heir, or to debate; and the caſe is, that *Murray* of *Cherrytrees* had made over his whole eſtate, therein including the lands of *Maiſon-Dieu*, to certain truſtees for uſes: now, as theſe truſtees were not called in the action of declarator, they are ſtill intitled to be heard on their objections to the right in the purſuer, to plead their defences, and their preferable right to the lands of *Maiſon-Dieu*.

*Anſwered* for Mr. *Goldie*, The cauſe was ripe for judgment before the death of the original defender, and its merits fully known to the Court. After his death, that there might be a perſon to ſuſtain the character of defender, the forms required, that the heir ſhould be called by a transference; he was called, but refuſed to enter. Now the decreet muſt be deemed valid and *in foro*; for that the caſe was fully debated by the father, the original defender, and afterwards his eldeſt ſon was regularly called, in order that he might receive judgment on the debate. The purſuer could not oblige him to repreſent or defend, and therefore juſtice will not permit him, by his refuſal, to undo the whole proceedings againſt his father. As to the right in the truſtees, it is founded on a latent, perſonal, revocable, and teſtamentary deed, granted by *Cherrytrees* in their favour, of which deed the purſuer had no knowledge; and as the truſtees have no intereſt in it diſtinct from the intereſt of *Cherrytrees*'s own family, it will follow, that the decreet obtained by Mr. *Goldie*, after debate with *Cherrytrees*, himſelf, and after transference of the action againſt his eldeſt ſon, muſt be held as concluſive againſt the truſtees.

" The

" The Lords found that it was ſtill competent to the truſtees to be heard " notwithſtanding of the decreet. D

Act. *A. Pringle, J. Ferguſon, & Advocatus.* Alt. *T. Hay, & A. Lockhart.* Reporter *Tinwald.*

N° XXXIX. 29th *November* 1752.

*EUPHAME EWING*

againſt

*RALPH DRUMMOND.*

*Elizabeth Anderſon*, widow of *John Ewing*, aſſigned her liferent-right to a houſe in *Stirling*, to her father-in-law, *John Ewing*. Upon his death this queſtion occurred, Whether the aſſignation fell to his heir, *Ewing*, or to his executor, *Drummond?* " The Lords preferred " the heir", being of opinion, that rights having *tractum futuri temporis* belong not to executors, for this reaſon, that it is the office of executor to collect without delay the effects of the defunct, and to diſtribute them according to the reſpective rights of all parties concerned; now this cannot be done with regard to ſubjects, which having *tractum futuri temporis* after the demiſe of the defunct, do not even exiſt when the office of executor commences. Altho' it was pleaded for the executor, that, as it is undeniable that the right of the aſſigny to the liferent in queſtion would have fallen to the Fiſk by the forfeiture of his ſingle eſcheat, by parity of reaſon ought it alſo to fall to his executor. D

Act. *J. Grant.* Alt. *P. Haldane.* Reporter *Tinwald.* Clerk *Kirkpatrick.*

N° XL. 1ſt *December* 1752.

*GRIZEL, MARGARET, and RACHEL MARJORYBANKS*

againſt

*ANDREW MARJORYBANKS.*

IN the year 1730, *Andrew Marjorybanks* of *Marjorybanks*, father of the above parties, executed a bond of proviſion in favour of his younger children. To each of his daughters he provided a certain ſum, and 6000 merks to a younger ſon, *Alexander*. All theſe proviſions were made payable at the firſt term after they ſhould reſpectively attain the age of fifteen, with penalty, and intereſt from the term of payment; and if any of the ſaid children ſhould die before majority or marriage, the portion of ſuch child was to return to the diſponer's eldeſt ſon for the time being. *Alexander*, above mentioned, attained the age of majority, but died before his father, in the year 1741. In the year 1742, *Marjorybanks* being upon death-bed, reſtricted the proviſions made to his three daughters (the purſuers) to the ſum of 525 *l. Sterling*, and declared that ſum to be in full of all they could claim from him by and through his deceaſe, or otherwiſe;

otherwiſe; and alſo revoked all former teſtaments by him made in their favour.

The purſuers, as three of the ſix neareſt of kin to their brother *Alexander*, inſiſted againſt their eldeſt brother, *Andrew*, for payment of their reſpective ſhares of the 6000 merks contained in *Alexander*'s bond of proviſion; and *pleaded*, that the bond was due as ſoon as *Alexander* attained the age of fifteen, with this limitation indeed, that if he died before majority, it ſhould return to his father's eldeſt ſon: that therefore *Alexander*'s right became abſolute and without limitation from the time that he attained majority, and conſequently was effectual to thoſe who might ſucceed to him, either by will, or *ab inteſtato*.

*Pleaded* for the defender: A proviſion made for a younger child is intended for the ſubſiſtence of ſuch child after the death of his father; and therefore if the child die before his father, the proviſion is voided *ob non cauſam*; and this more eſpecially, if ſuch proviſion be conſtituted in a deed of a teſtamentary nature: it is then a legacy, or at leaſt *mortis cauſa donatio*, and, according to a known maxim in law, muſt become void by the predeceaſe of the legatar or donatar. *Alexander* could never have claimed under this deed which the father retained in his own poſſeſſion, which he could have revoked at pleaſure, and in effect did revoke: for it cannot be ſuppoſed that he intended that the proviſion in favour of his deceas'd ſon *Alexander*, ſhould ſtill remain in force, when, by the deed 1742, he reſtricted the proviſion formerly granted to his daughters, and revoked all prior teſtaments made in their favour. *Alexander* then, was not creditor in the bond 1730; and if he was not creditor in it, his executors cannot be received to claim under his right.

" The Lords found that the purſuers have no claim on the proviſion " to *Alexander*, in reſpect he died before the father." D

Act. *J. Ferguſon, A. Lockhart.* Alt. *R. Craigie, & R. Dundas.* Reporter *Elchies.* Clerk *Gibſon.*

N° XLI. 5th *December* 1752.

## *DUNCAN STEWART*
againſt
## *JOHN MACFARLANE.*

*Duncan Stewart* had eight cattle ſtole, or carried off from his grounds, and ſearch being made for them, two of the hides of theſe cattle were found in the cuſtody of *John MacFarlane*. *Stewart* brought an action againſt *MacFarlane* before the Bailie of *Monteith*, concluding for payment of the value of the whole eight cattle, and for damages and expences.

The Bailie allowed the purſuer to prove that the two hides found in the cuſtody of the defender, were two of the hides of the cattle which had been carried off from the purſuer's grounds; and, on adviſing the proof, " found, that the purſuer had proved the ſaid hides to be two of " the hides of his ſaid cattle, and therefore found the defender liable for " the value of the whole eight cattle, and for damages and expences."

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The defender ſuſpended, and (denying always that the purſuer had proved the property of the hides), inſiſted, that he could not be liable for the value of all the eight cattle, ſuppoſing the hides of two of them had been found in his cuſtody, for there was no proof offered of his being acceſſory to the carrying away of the cattle; the only thing alledged againſt him was, that two of the hides were found in his cuſtody; and ſuppoſing he had reſet two, that could make him no further liable than for theſe he had reſet.

*Anſwered* for the charger, That it appeared from the proof, that all the eight cattle were carried off at once; and as the ſuſpender has brought no proof of the manner how he came to the poſſeſſion of theſe two cows, it muſt be preſumed he was acceſſory to the theft of the whole, and therefore muſt be liable for the value of the whole, as every perſon who is art and part of the crime is liable *in ſolidum*; and indeed it would be extremely hard upon proprietors, if thieves were only to be liable for the particular goods found in their poſſeſſion, when the proprietor has clearly proved that he had more goods ſtoln from him at the ſame time that theſe goods ſo found were ſtole.

" The Lords found the letters orderly proceeded." B

For the charger, *H. Home* & *Bruce*. For the ſuſpender, *Lockhart*. Reporter, **Lord *Drummore*.** Clerk *Gibſon*.

N° XLII. 6th *December* 1752.

*CAMPBELL* of *Calder*

againſt

*ROSE* of *Blackhill*.

IN the year 1731, *Campbell* of *Calder* appointed *John Hay*, writer to the ſignet, commiſſioner and factor for managing his affairs in *Scotland*. Mr. *Hay* granted a ſubfactory to *Roſe* of *Blackhill*, for levying the rents of his conſtituent's eſtate. In this ſubfactory a reaſonable gratification is provided for *Roſe*, but the particular ſum is not ſpecified. *Roſe* received the rents of the 1730, 1731, and part of the 1732. In the 1733, Mr. *Hay*, by letter, warned *Roſe* to give in his accompts; which however he never did. The factory granted to Mr. *Hay* having ceaſed, *Campbell* of *Calder*, in the 1748, inſiſted in a proceſs of compt and reckoning againſt *Roſe*, and concluded that he ſhould make payment of the balance due by him, with intereſt from the 1732, when the balance came into his hands.

*Pleaded* for the purſuer: It is the duty of a factor to accompt for all rents by him received, and to pay them inſtantly to his conſtituent. He is as much obliged to this, by virtue of his commiſſion, as a debtor is bound to pay the creditor upon a charge of horning and denunciation: a demand is not neceſſary; and if it were, it has been made, firſt in the 1733, and ſince that time repeated; ſo that from the whole of the caſe, intereſt is due.

*Anſwered* for the defender: The claim made by the purſuer is not founded in law, nor ſupported by any deciſion: the act of *ſederunt* by

 which

which factors named by the Court of Seſſion, are bound to pay intereſt from a year after the rents are due, plainly ſuppoſes, that, at common law, factors are not liable for intereſt *ex mora*; were it otherwiſe, factors appointed by the Court of Seſſion would, contrary to what is univerſally believed, be in a better ſituation than other factors: for the former are only liable after a year, the latter would be liable from the moment that they receive their conſtituent's money; nor will the caſe here be altered by the extrajudicial demand made by *Hay*, that not being a demand known in law, which requires a demand by proceſs.

" The Lords found the defender liable for intereſt upon the rents up-
" lifted by him from the time of the demand made upon him to
" clear his accompts; and as there was no factor-fee agreed upon,
" they fixed the ſalary at 2½ *per cent.* of the money uplifted by
" him." D

Act. *A. Lockhart.* Alt. *J. Burnet.* Clerk *Kirkpatrick.*

N° XLIII. 7th *December* 1752.

## *STEPHEN BROMFIELD*

againſt

## *JOHN YOUNG.*

IN an action for implement of a minute of tack purſued by *Bromfield*, *Young*, the tenant, *objected*, that the minute was null, for that it did not bear that the marginal notes were ſigned before witneſſes; the words of the teſting clauſe being, " Before theſe witnes, *Robert Brown*, te-
" nant [in] *Ednam*, and *John Fiſh* of *Caſtlelaw*, writer hereof, and witnes
" to the marginal notes alſo." Now ſince *writer hereof, and witnes to the marginal notes alſo*, cannot be applied to *Brown*, *Fiſh* muſt, in all propriety of ſpeech, be held to be the ſingle witneſs to the ſubſcription of the marginal notes, which therefore can bear no faith in judgment; and conſequently, that mutual contract, whereof they are a part, muſt alſo be null.

*Anſwered* for *Bromfield:* The writer of the deed imagined that the word *witnes* might be uſed in the plural number, as appears from the teſting clauſe above recited; and this explication being once admitted, the marginal notes will ſeem properly atteſted.

" The Lords repelled the objection. D

Act. *G. Pringle.* Alt. *A. Pringle.* Reporter *Kilkerran.*

N° XLIV. 12th *December* 1752.

## *JOHN CAMPBELL*

againſt

## *JOSEPH FAIKNEY.*

*Joſeph Auſtin* of *Kilſpindy* granted a promiſſory note, dated at *London*, for 50 *l.* payable to *David Graham* merchant in *London*.

*Auſtin*

*Auſtin*, having put his eſtate into the hands of truſtees, went abroad. *John Campbell*, caſhier of the royal bank of *Scotland*, raiſed a proceſs againſt *David Graham* for payment of certain debts; and upon the dependance arreſted, not in the hands of *Auſtin* the debtor of *Graham*, but in thoſe of *Auſtin*'s truſtees. Thereafter *Campbell* having obtained a decreet of conſtitution againſt *Graham* his debtor, raiſed a forthcoming againſt *Auſtin*'s truſtees; and alſo againſt *Auſtin* himſelf, who by this time had returned to *Scotland*; but he took the decreet of forthcoming againſt *Auſtin* only, not againſt the truſtees.

The promiſſory note in queſtion had been indorſed by a blank indorſation to *Andrew Pringle* merchant in *London*; but whether before or after the arreſtment, did not appear. *Andrew Pringle* ſold the note, as it ſtood, without indorſing his own name upon it, to *Joſeph Faikney* merchant in *London:* this was after the date of the arreſtment. In a multiplepoinding, at the inſtance of *Auſtin*, *Faikney* the indorſee objected to *Campbell*'s arreſtment, that it was null and void, becauſe uſed not in the hands of *Auſtin*, the debtor to *Graham*, but in the hands of *Auſtin*'s truſtees; for that ſuch an arreſtment was no better than if uſed in the hands of *Auſtin*'s factor: the truſtees might be debtors to *Auſtin*, but were not ſo to *Graham*.

2*do*, The decreet of forthcoming was informal, in ſo far as it was obtained, not againſt the truſtees in whoſe hands the arreſtment was laid, but againſt *Auſtin*, in whoſe hands no arreſtment was laid.

*Anſwered* for the arreſter, That the truſtees and *Auſtin* were *eadem perſona*; and the truſtees being debtors to *Auſtin*, muſt be conſidered as debtors to *Graham*: this will alſo account for the taking the decreet againſt *Auſtin* himſelf, who acknowledged his having granted the note.

There were alſo other points argued; particularly this, *viz.* whether the promiſſory note in queſtion, becauſe granted in *England*, where promiſſory notes have the like privileges as bills of exchange, ſhould therefore be conſidered as if it had been a bill? Many of the Judges gave their opinion in the affirmative; but it being moved by one of the Judges, to put the queſtion only upon the objection to the arreſtment,

" The Lords ſuſtained the objection to *John Campbell*'s arreſtment, and " therefore preferred *Joſeph Faikney* the indorſee." s

For the arreſter, *Ja. Ferguſon.* For the indorſee, *H. Home.* Clerk *Gibſon.*

N° XLV. 14th *December*, 1752.

## The MAGISTRATES of *Stirling*
## againſt
## The SHERIFF-Depute of *Stirling*.

A Complaint was brought before the Sheriff-depute of *Stirlingſhire*, by Doctor *Walter Stirling*, proprietor of a tenement within the Burgh of *Stirling*, againſt *John Finlayſon*, for an incroachment committed by him, by raiſing the ſide-wall of his houſe, whereby the eaſing-drop of Mr. *Stirling*'s houſe was prevented from falling as formerly, contrary to the ſervitude acquired by him.

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The Sheriff ſuſtained his own juriſdiction, and gave judgment upon the complaint: whereupon the private party obtained ſuſpenſion of the Sheriff's decree, and, at the ſame time, the Magiſtrates, Dean of Guild, and council of the burgh, brought a declarator before the Lords, to have it found and declared, " That, by virtue of their erection, the ſole and " only juriſdiction, in all queſtions concerning the building of houſes " within the burgh, taking down and re-building thereof, ſervitudes " thereon, and marches and boundaries of the ſame, belonged to them " and their ſucceſſors in office, excluſive of the Sheriff; and that the She- " riff had incroached upon their juriſdiction, by taking upon him to judge " in a queſtion of that nature, betwixt the before mentioned parties."

The Sheriff-depute and his ſubſtitute having been made parties in this proceſs, it was argued in ſupport of the declarator,

*Firſt*, That the ſubjecting the lieges to a variety of juriſdictions in the firſt inſtance, is attended with many inconveniences: that by our moſt antient law, the magiſtrates of burghs-royal had an excluſive juriſdiction in the firſt inſtance, over their own inhabitants, *Leg. Burg. cap.* 6. 7. & 61. and altho' ſubſequent cuſtom has made an alteration in this reſpect, in matters of ordinary juriſdiction, yet in all queſtions concerning the public policy, and the form and manner of building within burgh, the excluſive juriſdiction of the Dean of Guild, or other magiſtrates of the burgh, remained in its full force, and which behoved of conſequence to extend to all queſtions amongſt heritors, dependent upon, or neceſſarily connected with the policy and rule of building within the burgh.

*2dly*, The ſtyle of the brieve of lyning clearly points out where the juriſdiction lies in queſtions of this nature; for, inſtead of being directed to the Sheriff, as all other brieves are, it is directed *Praepoſito et Balivis burgi*; and appoints *quatenus per duodecim è melioribus et fidei dignioribus burgenſibus dicti burgi, per quos rei veritas melius ſcire poterit, magno ſacramento interveniente juſte, et ſecundum leges burgi limari, faciatis tenementum*, &c.

*3dly*, The act 182. Parl. 13. of *Ja.* VI. confirming the Dean of Guild's juriſdiction, expreſsly refers to the regulations of the burgh of *Edinburgh*, as the rule for aſcertaining the juriſdiction of this officer in all the burghs of *Scotland*; and by theſe regulations, § 3. it is provided, " That the " Dean of Guild and his council bear the haill burden, and decide in " all queſtions of neighbourhood; and nae neighbours wark be ſtayed " but by him."

And, *laſtly*, As the juriſdiction of the Dean of Guild, as officer of police within the burgh, is thus eſtabliſhed, both by antient cuſtom and ſtatute; ſo it muſt be much more convenient to the lieges, in queſtions of this nature, to reſort to him and his council, for the immediate cognition and trial of ſuch queſtions, than to await the judgment of the Sheriff, who may perhaps reſide in a diſtant burgh of the country, and has neither council nor judgment to aſſiſt him in the trial of ſuch caſes: And as this attempt of the Sheriff to extend his juriſdiction is new and unprecedented, ſo it does not appear that there is any reaſon, either from law, or the conveniency of the ſubjects, for favouring ſuch extenſion of his power.

*Anſwered* for the Sheriff: The *leges burgorum* never were acknowledged in this court, as any part of the law of *Scotland*. The paſſages referred to by the purſuer prove too much; for the Magiſtrates are thereby declared

declared to have an excluſive juriſdiction in all cauſes both civil and criminal ariſing within the borough, which, it is believed, was never the law of *Scotland*. The Sheriff's power of judging in caſes of this nature ariſes from his juriſdiction over the whole county; for, if he may judge in ſuch queſtions ariſing within villages or burghs of barony and regality within his county, why not alſo in burghs Royal? The purſuers, in this caſe, both by their erection and ſpecial grant of ſheriffſhip, may have a cumulative juriſdiction with the Sheriff; but neither of theſe was meant to exclude the juriſdiction of the Sheriff as Judge-ordinary over the whole county.

As to the act 182. Parl. 13. of *James* VI. it has no relation to the caſe in hand; it only confirms the power and juriſdiction of the Dean of Guild and his council, in all actions betwixt merchant and merchant, and betwixt merchant and mariner, conform to the uſage of the town of *Edinburgh*; but this general reference can, with no propriety, be extended to other actions than theſe mentioned in the ſtatute.

*Laſtly*, The argument from the addreſs and ſtyle of the brief of lyning, is of no weight. Where ſuch brief is directed to magiſtrates of burghs, the Sheriff can have no authority to execute the brief: but, if ſuch queſtions are purſued in the form of an ordinary action, and not by brief, there is no reaſon why the Sheriff may not judge in theſe as well as in any other queſtions that ariſe within his ſheriffdom. A parallel caſe occurs in diſputed marches of lands: if a brief of perambulation is raiſed for ſettling the marches, the Sheriff alone can execute the brief; but, if ſuch queſtions are brought to trial by the ordinary form of proceſs, the Sheriff cannot, from the ſtyle and addreſs of the brief of perambulation, pretend to an excluſive juriſdiction in ſuch actions: and this court every day ſuſtains ſuch actions, and determines therein in the firſt inſtance, notwithſtanding of the known ſtyle and excluſive power of the ſheriff in the execution of the brief of perambulation.

Some of the Lords doubted how far the Sheriff-depute was a proper party for ſuſtaining this declarator, without calling the officers of State for his Majeſty's intereſt. But others were of opinion, that, tho' the action could not be the foundation of a *res judicata* againſt other ſheriffs, or even againſt the Sheriff of *Stirling*, and his ſucceſſors, in other queſtions, the declarator was ſtill competent as to the particular action libelled.

" The Lords found, that the Sheriff did wrong in taking upon him to " judge in the queſtion betwixt *Walter Stirling* and *John Finlayſon* " mentioned in the libel; and found, that the purſuers have the on- " ly power of judging in that and all other queſtions of that ſort " within burgh." M

Act. *P. Halden*, & *J. Erſkine*. Alt. *R. Bruce*, *T. Miller*, & *A. Pringle*. Reporter Lord *Elchies*. Clerk *Juſtice*.

N° XLVI. 15th *December* 1752.

## *PENNYCOOK* and *GRINTON* againſt *GRINTON* and *GRAITE.*

*JOHN Grinton*, a tenant, made propoſals of marriage to *Aliſon Pennycook*, and obtained her conſent. Upon receiving repeated promiſes of marriage, ſhe permitted him to have knowledge of her body oftner than once; by conſequence of which, in *July* 1747, ſhe bare a ſon, whom he acknowledged to be his, and preſented to the Miniſter of the place to be baptized. After this, *John Grinton* declined to adhere: upon which, in 1748, *Aliſon Pennycook* commenced a ſuit againſt him before the Commiſſaries of *Edinburgh*, ſetting forth the facts above mentioned; but concluding only for expences of child-bed, aliment to the child, and damages. In this proceſs, the courtſhip, the promiſes of marriage, the copulation, and the procreation of the child, were referred to *John Grinton*'s oath; and he in effect acknowledged them all, altho', at the ſame time, he alledged his being in liquor when he made the propoſals and promiſes.

A year and a half having elapſed, and no further motion made in this proceſs, *John Grinton*, in *January* 1750, made his propoſals to *Anne Graite*, and married her. But this marriage was private, and without proclamation of banns: however, he brought her immediately home to his houſe, and lived publicly with her as his wife. Another year elapſed, and a child was alſo born of this marriage. During all this while, *Aliſon Pennycook*, altho' ſhe had opportunity to know of *John Grinton*'s ſecond marriage, yet took no ſtep in her proceſs: but, in *January* 1751, ſhe raiſed againſt him a new ſummons, in her own and her ſon's name. This ſummons, ſetting forth the very ſame facts as the former had done, and referring, for proof thereof, to the oath above mentioned, contained the proper concluſions, declaratory of her marriage, and of the legitimacy of the child: at the ſame time, it contained a concluſion of divorce on account of the defender's open adultery with *Anne Graite*. Upon this, *Anne Graite* raiſed a counter-proceſs declaratory of her marriage. The Commiſſaries found, "the marriage between *John Grinton* and *Aliſon Pennycook* proven; "and declared them huſband and wife, and *James Grinton* their lawful "child; and found it proven, that *John Grinton* and *Anne Graite* had ce-"lebrated a marriage in *January* 1750; but that the ſame was unlawful, "void and null; and found, that, in reſpect of *John Grinton*'s cohabita-"tion with *Anne Graite*, he had been guilty of adultery; and therefore "they divorced and ſeparated *Alliſon Pennycook* from him, and found her "intitled to by-gone aliment from the time of her marriage, and until "the date of the decreet: and found *James Grinton* intitled to aliment "from the time of his birth, until he ſhould attain the age of 14 years; "and, in order to the modification of theſe aliments, allowed *Aliſon Pen-"nycook* to give in a condeſcendance of *John Grinton*'s circumſtances: and, "laſtly, they found *John Grinton* liable in expences of proceſs, and dues "for extracting the decreet."

In

In an advocation, at the inſtance of *John Grinton* and *Anne Graite*, it was *pleaded* for them, that *Aliſon Pennycook* did not underſtand that any obligation to marry had been contracted between *John Grinton* and her, far leſs that an actual marriage had interveened: and that this her ſenſe of the matter was evident, firſt from this, that her firſt ſuit concluded for damages only; for her making mention of the promiſe of marriage could mean nothing more, than an apology for the ſurrender of her virtue. Her ſenſe of the matter was further evident from her ſilence during more than a year and a half before, and a year after the marriage with *Anne Graite*.

But, 2*do*, *et ſeparatim*, it was pleaded, as a general point of law, that *John Grinton*'s promiſes to marry, altho' followed by a *copula*, cannot, in the ſtrongeſt ſenſe, infer more than an obligation upon him afterwards to ſolemnize and complete a marriage. This obligation might, by the intervention of a mid impediment, become unperformable. Suppoſing *John Grinton* had died, his obligation to marry muſt have died with him. In this caſe, the ſecond marriage became a mid impediment no leſs effectual than death; and therefore the obligation could no otherwiſe iſſue than in damages to the party. Upon this point, important as it is, our lawyers have not wrote with intire preciſion; yet, by their making mention, that, in a like caſe, there would be an action to compel the party refractory to complete the marriage, it is very plain, they did not hold the marriage to be actually completed. It muſt have been upon theſe principles that my Lord *Stair*, *lib.* 1. *tit.* 4. *par.* 6. mentions, that, in the caſe of *Barclay* againſt *Napier*, the man was obliged to ſolemnize the marriage, ſeeing he had procreated children with the woman. Sir *Thomas Craig*, *lib.* 2. *dieg.* 18. *par.* 19. relating the caſe of *Edward Younger*, ſays, *Et Commiſſarii, viri acuti, ſucceſſionem bonorum mobilium conceſſerunt liberis* Edwardi Younger, *licet matrimonium nunquam fuit contractum, neque banna proclamata, ea ratione, quod cum* Edwardus, *ſub fide futuri matrimonii, eos liberos ſuſcepiſſet, materque apud Commiſſarios cauſam obtinuiſſet, ut* Edwardus *matrimonium promiſſum implere cogeretur; eo recuſante, perinde habuerunt, ac ſi eam in uxorem duxiſſet, liberiſque bonorum mobilium executio ſive hereditas adjudicata eſt. Conſtat ergo, ubi nunquam matrimonium de facto intervenit, poſſe aliquando legitimos, ſaltem legitimatos eſſe.*

This doctrine is well founded in reaſon; for dreadful were the conſequences, if promiſes, made for the moſt part in *æſtu libidinis*, and kept private, or, at leaſt, not properly put in ſuit, ſhould have the effect to make void a ſubſequent and formal marriage, and to baſtardize the iſſue of it.

*Anſwered* for *Aliſon Pennycook:* That her not having concluded properly in her firſt ſummons, was the overſight of her Procurator, and, at any rate, might be amended; for, in that ſummons, ſhe had fully ſet forth the facts which inferred the marriage. *Anne Graite* did not pretend to be ignorant of her claim; and it was evident that the fear of objections upon that account, was the reaſon why the celebration of the ſecond marriage was private, and without proclamation of banns; therefore *Anne* could not complain ſhe was deceived: but, at any rate, in the *ſecond* place, the general point of law was abſolutely clear, That a promiſe of marriage followed by conjugal intercourſe, made an actual and legal marriage, altho' not a formal one. Such was the rule of the canon law itſelf, notwithſtanding the great ſtreſs it laid upon ſacerdotal benediction. This appears from *lib.* 4. *tit.* 1. *cap.* 30. *Decretalium de ſponſalibus et matrimonio:*

*is*

*is qui fidem dedit mulieri ſuper matrimonio contrahendo, carnali copula ſubſecuta, ſi in facie eccleſiae ducat aliam et cognoſcat, ad primam redire tenetur*, &c. Altho' our law followed not the canon law, ſo far as to give action upon *ſponſalia de futuro*, or bare promiſe of marriage; yet *ſi copula ſubſecuta*, it makes a legal marriage *de préſenti*. This is expreſsly laid down by Lord *Stair*, *lib.* 1. *tit.* 4. *par.* 6. where, ſpeaking of preſent conſent, which makes the eſſence of marriage, he ſays, " That may " be by natural commixtion, where there hath been a promiſe or eſpou- " ſal preceeding; for therein is preſumed a conjugal conſent *de preſenti*." And again, *lib.* 3. *tit.* 3. *par.* 42. he ſays, " After contract or promiſe " of marriage, or *ſponſalia*, if copulation follow, there is thence preſumed " a matrimonial conſent *de preſenti*, which therefore cannot be paſſed " from by either or both parties, as having the eſſential requiſites of mar- " riage." And in the *tit.* firſt mentioned, he relates, that in the caſe of *Barclay* againſt *Napier*, the man was obliged to ſolemnize the marriage, altho' the woman, in a contract poſterior to the contract of marriage, had renounced the ſame. This is alſo agreeable to our antient practice, as appears from Sir *Thomas Craig*; where he relates, that, in the caſe of *Edward Younger* (above mentioned) the Commiſſaries firſt decerned him to ſolemnize the marriage; and, upon his refuſal, declared the marriage, and the legitimacy of the children. Theſe learned authors are clear as to what made the eſſence of marriage; and as to the ſolemnization mentioned by them, that was only required for the ſake of public order and decency. The principles here laid down are ſupported by the uniform practice of our courts, where, upon evidence of the promiſe and *copula*, the conſtant ſtyle of their judgment is, " declaring the parties to be mar- " ried, decerning them to adhere, and declaring the legitimacy of the " children."

This caſe was taken up by the Lords intirely upon the general point; and it was held for law, that a promiſe of marriage, followed by a *copula*, made, from that moment, an actual marriage.

" The Lords remitted the cauſe to the Commiſſaries *ſimpliciter*." s

Act. *Ferguſon.* Alt. *Lockhart.* Reporter *Drummore.*

N° XLVII. 15th *December* 1752.

Major *GEORGE MONCRIEFF* and OTHERS

againſt

Mrs. *MARGARET BALFOUR* of *Burleigh.*

BY charter under the great ſeal, bearing date *anno* 1685, there is diſponed to *Robert Maſter* of *Burleigh*, " all and whole the lands and ba- " rony of *Strathmiglo*, comprehending the villages and lands of *Dem-* " *perſton*, Eaſter and Weſter *Skelbos* lands, &c. with full power and pri- " vilege of commonty in the *Lowmonds* of *Falkland*, and the hills of " the common muir and commonty of *Auchtermuchty*," all erected into an haill free barony, by a charter of *James* VI. called *the barony of Strathmiglo.*

A

A diviſion of the commonty of *Auchtermuchty* having been brought, at the inſtance of certain of the heritors intereſted therein, upon act 1695, a queſtion aroſe, in the courſe of this proceſs, whether the heritor of the barony of *Strathmiglo* was intitled to a ſhare of ſaid commonty, effeiring to the valued rent of the whole barony, or only to the valued rent of the lands of *Demperſton*, the only tenement of the barony which had ever been in poſſeſſion of the ſaid commonty?

*Argued* for the heritor of *Strathmiglo:* That as the whole barony of *Strathmiglo* lies contiguous, and is naturally united, ſo the right and privilege of commonty, in the common of *Auchtermuchty*, is given as appertaining to the whole barony; and conſequently a proportional intereſt in the ſaid common was eſtabliſhed in the proprietor of the barony effeiring to the valued rent of the whole barony: That as it was admitted that poſſeſſion of the commonty hath been enjoyed to a certain extent, by the heritor of the barony of *Strathmiglo*, *viz.* by his tenants of *Demperſton*; conſequently there could be no pretence that his right was excluded by the negative preſcription, or acquired to the other heritors of the commonty by the poſitive preſcription: for, tho' in ſervitudes or rights of property acquired by preſcription, the extent of the right muſt depend upon the poſſeſſion, which being the ſole foundation of the right, muſt alſo be the only meaſure of its extent; yet, where a right of property or ſervitude is conſtituted by expreſs grant, as in the preſent caſe, the extent of the right does not depend upon the poſſeſſion, but upon the terms of the grant.

*Anſwered* for the other heritors: The charter in favours of the Maſter of *Burleigh* contains alſo the right of commonty in the *Lowmonds of Falkland*; and as the proper lands of *Strathmiglo*, are adjacent to, and have been in the conſtant poſſeſſion of this commonty of the *Lowmonds*; ſo it is admitted, that the lands of *Demperſton* have been in the poſſeſſion of the commonty of *Auchtermuchty*; which diſtinct poſſeſſions plainly ſhow, that theſe different commonties have been pertinents of the ſaid principal lands reſpectively, before their union into a barony: the words of the charter can be no otherwiſe underſtood, than by applying *ſingula ſingulis*.

2*do*, A barony is an union of diſtinct tenements and rights for juriſdiction, and other purpoſes, and, no doubt, comprehends the whole parts and pertinents, whether of property or ſervitude, which belonged to the ſeveral tenements before their erection; but a barony being only *nomen dignitatis et juriſdictionis*, cannot be conſtructed as a *fundus* or principal tenement, to which a ſervitude or other pertinent can properly belong. Servitudes, and other pertinents, belong to, and are *correlate* to the particular tenements which compoſe the barony, but not to the right of barony itſelf, which is only a *nomen juris*, to which no ſuch ſervitude or pertinent can belong. And if the common in queſtion ſhould be ſet off to the heritor of *Strathmiglo*, in proportion to the valuation of the whole barony, the conſequence would be, that the heritor would be intitled to a ſhare in the diviſion effeiring to his fiſhings, ſuperiorities, mulctures, and others, which all enter into the valuation of the barony; and this, at firſt ſight, appears abſurd, ſeeing none of theſe are ſubjects to which a right of commonty or ſervitude can, in any ſenſe, belong.

" The Lords found that the heritor of the barony of *Strathmiglo* was " intitled to a ſhare in the diviſion of this commonty, effeiring to " the valued rent of the lands of *Demperſton* only." M

Act. *R. Craigie.* Alt. *R. Dundas.* Reporter, Lord *Elchies.* Clerk *Juſtice.*

N° XLVIII. 19th *December* 1752.

Doctor *PARK*

againſt

*DALRYMPLE.*

DOctor *Park* brought an action upon the paſſive titles, againſt *Elizabeth Dalrymple*, his wife's ſiſter, for medicines furniſhed to her deceas'd father, and fees for attending him. He offered proof of the furniſhings, and viſits; and, among other witneſſes, produced the widow of the deceas'd.

*Objected:* That the witneſs was the purſuer's mother-in-law, and therefore could not be received.

*Anſwered*, 1*mo*, the witneſs was alſo the defender's mother; and ſo, being equally related to both parties, there was no fear of partiality. 2*do*, She was a neceſſary witneſs.

*Replied*, 1*mo*, Equal relation to both parties does not take off the objection of relation. 2*do*, The furniſhing of medicines, and viſits of a phyſician are open and voluntary acts, and are eaſily proved; therefore the widow was not a neceſſary witneſs.

" The Lords ſuſtained the objection." S

Act. *Geo. Brown.* Alt. *Boſwel.* Clerk *Forbes.*

N° XLIX. 21ſt *December* 1752.

*LANG* and *CROSS*

againſt

The EXECUTORS of the Counteſs of *Forfar*, and the DUKE of *DOUGLAS.*

THE late *Rabina*, Counteſs of *Forfar*, was, by her contract of marriage and other liferent-rights, provided to the liferent of the lands and Lordſhips of *Bothwell* and *Wendall*, and, *inter alia*, " of the woods " growing thereupon, to be bruiked and enjoyed during all the days of " her life. The Duke of *Douglas* having ſucceeded to the fee of theſe lands, confirmed by deed of ratification, all her liferent-rights, and, among others, her right to the liferent of the woods.

In virtue of this right, the Counteſs was in uſe to diſpoſe of the natural woods upon the liferented-lands, by ſelling them in haggs, or years cuttings. In the year 1740, ſhe entered into a contract with *Lang* and *Croſs*, two wood-cutters, by which ſhe ſold them one hagg, called the *ſouth wood*, then eighteen years old, which they were to cut down and clear away in fourteen months; and ſhe received the price agreed upon.

After

After the elapſe of an year, when about three fourth parts of the wood was cut down, the Counteſs died: upon which the Duke interrupted and ſtopt the woodcutters from cutting down the remainder.

The woodcutters ſued both the Duke and executors of the Counteſs for damages.

*Pleaded* for the Duke: That, by the law of *Scotland*, a liferenter has no right to cut down and diſpoſe of woods: See act 1491, *Ja.* IV. Parl. 3. cap. 25. alſo, act 1535. *Ja.* V. Parl. 4. cap. 15. Upon theſe acts, Sir *George Mackenzie* obſerves, that a liferentreſs has only right to as much of the coals or trees as are neceſſary for her own uſe. Sir *Thomas Craig*, *lib.* 2. *dieg.* 8. § 17. & 18. lays down this as an expreſs principle of our law; and he mentions a caſe in point. The ſame was found in the caſe of the Duke of *Hamilton* againſt the Ducheſs, 25th *Jan.* 1722; where it was alſo found, that the fiar might, notwithſtanding of the liferent-right, cut and diſpoſe of the woods, by ſale, or otherwiſe: nor was it regarded, that, in like manner, as in the preſent caſe, the Ducheſs was provided in the liferent of the woods; for this was conſtrued to mean no more, than ſuch part of the wood as was neceſſary for the uſes of the barony. If then this be the law, the Duke's ratification gave the Counteſs no new right. By conſequence, the Duke, if he pleaſes, has right to make the executors of the Counteſs accountable for the whole wood diſpoſed of by her. But the Duke did not inſiſt upon any of theſe arguments, farther than to ſave ſuch parts of the wood as remained ſtanding at the Counteſs's death. As to theſe, he *contended*, that, at this period, her right, whatever it was, did undoubtedly determine: for even ſuppoſing the woods to be natural fruits in the poſſeſſion of the liferentreſs, yet ſuch of them as remained ſtanding at her death were *pars ſoli*, and muſt belong to the heir.

*Anſwered* for the executors of the Counteſs: That from the principles of law in general, all fruits and profits that can be reaped, *ſalva rei ſubſtantia*, may be lawfully taken by a liferenter. A *ſilva cedua* plainly falls under this deſcription. But, without entering into that diſquiſition, the Counteſs's liferent-rights, ratified by the Duke, gave her a title to diſpoſe of the woods. Upon this footing, with regard to the determination of her right, *argued*, That as ſhe had ſold the wood, and received the price, and as the purchaſers had cut down almoſt $\frac{3}{4}$ of it, and might have cut down the whole long before her death, theſe circumſtances ought, as to her, to infer a *perceptio*, or *ſeparatio a ſolo*; and this the more eſpecially, that the Duke was in the knowledge of the bargain, and ſaw the execution of it carried on for above a year, without objecting.

In this caſe, it appeared, that the Counteſs had been rather premature in diſpoſing of this wood; for, in a proof allowed by the Lord ordinary, it came out, that the common age in that country, for cutting woods, was from 20 to 30 years; whereas ſhe had ſold it at the age of 18 years. But the court did not ſeem to lay any ſtreſs upon this circumſtance; and ſeveral of the Lords gave their opinion, that the liferentreſs had no right at all to diſpoſe of the woods; and therefore that no action could lie againſt the Duke. But as the queſtion concerned only ſuch part of the woods as remained ſtanding at the Counteſs's death, there was no interlocutor on the general point.

" The Lords ſuſtained the defence for the Duke, and aſſoilzied him;
" but found the executors of the Counteſs liable to the purſuers in
" damages

" damages, with intereſt thereon, from the term of *Martinmaſs*, af-
" ter the interruption by his Grace; and found expences due."

For the Duke, *A. Pringle.* For the executors, *Ja. Erſkine.* Clerk *Kirkpatrick.*

N° L. 21ſt *December* 1752.

*WILLIAM CUMING* Merchant in *Edinburgh*

againſt

*JOHN* and *JAMES MARSHALLS* Merchants in *Auchtermuchty.*

*William Cuming*, a merchant of a fair character, ſued *John* and *James Marſhalls*, for payment of an accompt, containing, among other articles, one, in theſe words, " To bank notes ſent *per* poſt *L.* 100." He produced a letter, from the defenders, dated 28th *October* 1751, ordering him to ſend them by the poſt, *L.* 100 in notes; and he alledged he had accordingly, the next day, upon receiving their order, wrote them an anſwer; and, with his own hands, incloſed in it the *L.* 100, and ſent it by his ſon to the poſt-office.

*Marſhalls* acknowledged the commiſſion; but as the anſwer and notes had never come to their hands, *pleaded*, They had no reaſon to believe the money had ever been ſent, and therefore they could not be liable.

A proof being allowed before anſwer, the purſuer was not able to bring any direct evidence, either of his having incloſed the notes, or ſent the letter to the poſt-office. But he proved by his clerks, that, in letters which he dictated to them, he was in uſe to incloſe bank-notes to his correſpondents, and, in particular, to theſe defenders: that he generally ſealed theſe letters himſelf, and ſent them to the poſt-office by his ſon, who attended his ſhop, in the quality of a clerk: that, on the very day the letter covering the notes was ſaid to be ſent, a copy of it had been entered in his copy-book of letters, and the ſum entered into his caſh-book; and that, in the ſame evening, his caſh was balanced, and the ſum found exactly to anſwer with the caſh in hand. It appeared likewiſe in the proof, that the poſt-ſeal had been broke off the *Falkland* bag, in which this letter ſhould have been carried. But this laſt circumſtance did not ſeem to have any weight in the determination of the cauſe; for, upon adviſing the proof, the court was of opinion, that the purſuer's books, together with his oath in ſupplement, if required, was ſufficient evidence that the commiſſion was obeyed. An example was given of notifying the diſhonour of a bill of exchange, where a copy of a letter to the drawer or indorſer, ingroſſed in the copy-book of letters, is held ſufficient proof, without neceſſity of bringing parole evidence, that the letter was wrote and delivered at the poſt-houſe.

The defenders, upon hearing the opinion of the court, did not inſiſt for the purſuer's oath in ſupplement.

" The Lords found that Mr. *Cuming* had executed the commiſſion gi-
" ven him by *Marſhalls*, faithfully and conform to their orders; and
" therefore found the defenders liable to the purſuer in the accompt
" claimed

" claimed, and alſo in expences of proceſs, and for extracting the " decreet." s

Act. *Jo. Grant.* Alt. *Ro. Craigie.* Clerk *Juſtice.*

N° LI. 22d *December* 1752.

Lieutenant *WAUCHOP*

againſt

*JOHN GIBSON* of *Durie.*

BY contract of marriage, dated 1713, betwixt the deceas'd *Alexander Gibſon* of *Durie*, and *Elizabeth Stewart* his ſecond wife; the former became bound to provide and ſecure to the children of the marriage, if three or more, 20,000 merks, to be divided by the father, and payable at the firſt term after his deceaſe; which ſums are declared to be in full contentation and ſatisfaction of their legittim, *&c.*

Of this marriage, there was iſſue, four children, *viz. Alexander*, *Anne*, *Cecil*, and *Mary*; all of whom ſurvived their father.

In 1727, *Durie* made a total ſettlement of his eſtate in favour of *John Gibſon* the defender, his eldeſt ſon by the firſt marriage; and, of the ſame date, he executed a bond of proviſion, in favour of the four children of the ſecond marriage, by which, upon the narrative of *their being yet unprovided*, he became bound to pay to each of *Alexander* and *Anne*, 6000 merks, and to each of *Cecil* and *Mary*, 5000 merks, at the firſt term after his deceaſe; and, failing any of the ſaid children by deceaſe, without lawful iſſue of their own bodies, the one half of ſuch child's portion is declared to pertain and belong to the ſaid *John Gibſon*, and the other half to be equally divided among the ſurviving children; declaring the ſame to be in full ſatisfaction to the ſaid children, of all executry, Portion natural, and bairns part of gear, they can aſk or claim by his deceaſe, but reſerving to himſelf power to revoke or alter, *&c.* *Durie* alſo granted an additional bond of proviſion, dated in 1728, wherein he recites the bond 1727, and that the annualrent of the portions granted to his younger children, would not be ſufficient for their education and maintenance, therefore ſettled an annuity of *L.* 100 *Scots*, over and above the annualrents of their portions. Soon thereafter *Durie* died. *Alexander* and *Cecil* died ſoon after him. *Mary*, by her teſtament and aſſignation, made over to her only ſurviving ſiſter *Anne*, wife of the purſuer, her whole effects; and particularly the 5000 merks contained in the bond 1727.

After *Mary*'s death, the purſuer, under the right of *Anne*, his wife, brought his action againſt *John Gibſon* the defender, and claimed 1*mo*, The 20,000 merks provided in the contract of marriage. 2*do*, The 5000 merks provided to *Mary* by the bond 1727, and by her conveyed to his wife.

*Objected* to the claim of the 20,000 merks, That the proviſions in the bond 1727, came in lieu of it. By our law, *debitor non p aeſumitur donare*; and indeed the narrative of the latter proviſion bearing to have been for love and favour to theſe children, and that they were yet unprovided, plainly ſhows that *Durie* intended it to come in place of the former; and this appears ſtill more clear from the additional bond 1728. Further,

both proviſions are declared to be in ſatisfaction of the claim of legittim. Now *Durie* could never intend double ſatisfaction for the ſame claim.

*Anſwered* for the purſuer: New bonds of proviſion are not underſtood to be in ſatisfaction of former ones, unleſs this be expreſsly declared. Now the ſecond proviſion is not only not expreſsly declared to be in ſatisfaction of the firſt, but there ſeems to be a tacit declaration of the contrary: for when *Durie* declares the ſecond bond to be in ſatisfaction of the legal proviſions; he ſeems purpoſely to have omitted the conventional one, ſo that *incluſio unius eſt excluſio alterius.*

In the *ſecond* place, The proviſions in the contract of marriage are onerous, and no way in the power of the granter. Thoſe in the bond 1727, are revocable at his pleaſure, therefore the latter cannot come in place of the former; for this would in effect make the former as much revocable as the latter.

*Objected* to the purſuer's claim of the 5000 merks provided to *Mary*, by the bond 1727, and by *Mary* conveyed to his wife, that from the conception of that bond, the defender had right to retain one half of it. The proviſion was under this condition, to wit, that failing iſſue of *Mary*, one half ſhould pertain to the heir. This condition, which is no leſs than a right of return to the granter's heir, could not be defeated by *Mary*, at leaſt not by her gratuitous deed. It is very different where a ſubject is conveyed to a child, with ſimple ſubſtitution; there the fee is veſted in the child, and implies the power of diſpoſing: ſee the caſes of Duke of *Douglas* againſt *Lockhart* of *Lee*, 18th *February* 1717; *Scot* againſt *Scot*, 1683; *Irvine* again *Irvine* of *Drum*, 29th *December* 1725; *Napier* againſt Lady *Logan*, *June* 1740; *Lumſdain* againſt *Beatſon*, *July* 1747.

*Anſwered* for the purſuer: There is not here a clauſe of return to the granter of the bond; there is only a ſimple ſubſtitution of the granter's heir, which the inſtitute, a ſimple fiar, could defeat, even by a gratuitous alienation. 2*do*, This is the better founded, if the objection to the firſt claim be ſuſtained; for the proviſions in the contract of marriage were ſimple and liable to no return; and therefore proviſions alledged to come in place of theſe muſt be ſo too. *Laſtly*, The court have in many caſes been very ſtrict in their interpretation even of clauſes of return. See the caſes of *Semple* againſt *Geddes*, 17th *July* 1725; *Frazer* againſt *Frazer*, *February* 1682; Lady *Ardkinlees* againſt the heirs of *Tailzie*, 1733; *Stewart* againſt *Stewart*, 24th *June* 1669; *Murray* againſt *Murray*, 18th *November* 1680; *Macaulay* againſt *Tennent*, *January* 7th 1627; *Laurie* againſt *Borthwick*, *February* 1683.

" Found that the bonds of proviſion were in lieu of the proviſions in " the contract of marriage; but found that the ſubſtitution in the " bond of proviſion to *Mary Gibſon* did not reſtrain her after her fa- " ther's death, from diſpoſing of her proviſion; and as ſhe did diſ- " poſe thereof to her ſiſter *Anne*, that therefore the preſent *Durie* " has no right to retain the half, in virtue of the ſubſtitution." s

Act. *A. Lockhart.* Alt. *R. Craigie.* Clerk *Kirkpatrick.*

N° LII. 22d *December* 1752.

*EMILIA BELSCHES*, and *EBENEZER OLIPHANT* her Husband,

against

Sir *PATRICK HEPBURN MURRAY*.

IN the year 1738, *Anthony Murray*, in a settlement of his estate, bound and obliged the disponees to pay all his debts that should be owing by him at the time of his decease, and all legacies left and bequeathed, or that should be left and bequeathed by him; and particularly to pay to Mrs. *Emilia Belsches*, his niece, *L.* 300 *Sterling* at the first term, after her marriage, with annualrent the eafter, *&c.*; as also to pay *L.* 15 *Sterling* yearly of annuity to her, from the first term after his decease, until the said principal sum should become due.

Two years afterwards, Mr. *Murray* made a new settlement, wherein he left out the first disponees, and in their place substituted the defender, declaring, that he should be obliged to pay the disponer's debts and legacies, left in the former disposition.

Soon thereafter, *Emilia Belsches* married *Ebenezer Oliphant*, and had issue two sons.

In the year 1744, Mr. *Murray* executed a bond, mentioning, that for the love and favour he bore to Mrs. *Emilia Belsches*, spouse to *Ebenezer Oliphant*, he bound himself, his heirs, executors and successors, to pay to her in liferent, and to her children in fee, which failing to her husband, which failing to return to the granter, the sum of *L.* 1200 *Sterling* at the first term after his decease, with annualrent thereafter; and which sum was to be divided amongst the said children by the said *Emilia Belsches*, *&c.* excluding always her said husband's *jus mariti*, *&c.*"

After *Anthony Murray*'s death, his succession was taken up by the defender in terms of his settlements, and he implemented to the pursuers the deed for *L.* 1200; but the pursuers claimed also, and brought their action for the first legacy of *L.* 300, with interest, from the first term after their marriage; and they insisted that the two legacies are entirely separate and distinct, are granted in different deeds, are different in their sums, in the term of payment, and are even payable to different parties, and with different substitutions: further, the bond containing the second legacy, is granted for love and favour, and expresses no antecedent cause: for these reasons the latter legacy cannot be said to revoke the former. See the cases of *Stewart* against *Fleming*, 24th *July* 1623; Lord *Cardross* against the Earl of *Mar*, 20th *February* 1639; *Stirling* against *Deans*, 20th *June* 1704; also *L.* 12 *de probat et presumpt.*

*Pleaded* for the defender: *Debitor non presumitur donare:* and it is evident from the circumstances of the case, that, tho' not so expressed, the first legacy is included in the second. When Mr. *Murray* made the first grant of *L.* 300, his niece was unmarried; and the deed was only calculated in the view of her remaining so until after his decease: this is evident, by his settling upon her an annuity of *L.* 15 *Sterling*, payable from the first term after his decease, to the first term after her marriage. But when he saw her married to his fatisfaction, and have issue, he gave her

a new proviſion, four times as large as the former, and ſettled it upon her children: it is therefore to be preſumed, that this was all he intended for her, and that he had forgot the firſt legacy, elſe he would have either included or excluded it. Had he been a party to her contract of marriage, and therein bound himſelf to pay the *L.* 1200, there could have been no doubt of its including the former legacy: ſee the dictionary, vol. II. p. 146. What he did was equivalent; ſeeing the grant, tho' poſtnuptial, was plainly in contemplation of the marriage, and contained all the clauſes and proviſos that he would have put in her contract, for ſecuring and diſpoſing of the ſum he gave her. See the caſe of *Wallace* againſt *Wallace*, 11th and 13th *November* 1624; *Burnet* againſt *Maitland* and *Young*, 24th *February* 1709; *Davidſon* againſt *Rendal*, 25th *June* 1706: alſo, *L.* 34. § 3. *ff. de legat.* 1 *L.* 22. *ff. de legat.* 2. *L.* 1. § 14. *ff. de dote praelegata. L.* 11. *cod. de legat.*

With regard to the deciſions quoted by the purſuers, the queſtion in each of them was, whether a donation *inter vivos* ſhould deprive the donee of a ſettlement, *mortis cauſa:* and in the caſe from the civil law, the queſtion related to the validity of the latter deed, not of the former.

" The Lords found the *L.* 300 not due." S

Act. *R. Craigie.* Alt. *Ja. Ferguſon.* Reporter, Lord *Elchies.* Clerk *Gibſon.*

N° LIII. 26th *December* 1752.

The TAX-MEN of the Town of *Edinburgh*'s Impoſt upon Wines againſt

Sir *ROBERT MYRETON* of *Gogar.*

IN *April* 1671, the town of *Edinburgh* obtained a grant from King *Charles* II. of an impoſt or duty upon certain wines and other foreign liquors; the grant proceeds on a narrative of the neceſſity of granting ſuch impoſt, in theſe words, *Adeo ut niſi prorogatio impoſitionis ſuper vino, aliiſque exteris commoditatibus importandis concedatur omni tempore futuro* [*magiſtratus*] *non ſolum in capaces reddentur ſuſtinere communes ſumptus negotiorum dictae civitatis, ſed neceſſario cogentur ſubjacere oneri eorum antiqui aeris alieni, &c.* And the grant is in the following words, *Dedimus, &c. Impoſitionem et cuſtumam ſummae duorum ſolidorum monetae Scotiae ſuper unoquoque Scotico pincto vini Gallici; quatuor ſolidorum monetae predictae ſuper unoquoque Scotico pincto vini Hiſpanienſis et Rhenenſis,* lie brandy-wines, *extranea aqua vitae, aquis recoctis, aliiſque extraneis liquoribus diſtillatis; ſummae duodecim denariorum monetae Scotiae ſuper unoquoque Scotic. pincto de,* lie mum, *et ſuper unoquoque Scotico pincto extraneae cereviſiae et zythi; importand. et vendend. intra dict. civitatem de Edinburgh, vel quasvis libertates ejuſdem poſtea ſpecificat; ſolvend. per venditores et cunctos alios invect res dicti vini ſpecierum praedict. extranei zythi et cereviſiae, ad dictam civitatem et territoria eo ſpectan. viz. ad* South and North *Leiths, Canongate, &c.* And the grant ordains letters of horning to paſs at the inſtance of the magiſtrates of *Edinburgh,* for payment of the ſaid duty, *ſuper pincto dict. vini, &c. importand. omni tempore futuro, per venditores et invectores dict. commoditatum*

*commoditatum intra dictam civitatem, partes, &c. ſupra expreſs.* And in 1672 this grant was ratified in Parliament.

From the date of this grant, down to *Auguſt* 1751, the Magiſtrates were in uſe to give *gratis* warrants to the inhabitants, for importing from *Leith*, or elſewhere, free of the ſaid duty, ſuch wines as the inhabitants intended to conſume in their own private houſes; ſo that, during that period, the duty was only exacted on wines and others ſold in taverns, or retaled in ſhops; but all wines, *&c.* attempted to be brought into the city, not accompanied with ſuch *gratis* warrants, or with an impoſt warrant from the collectors of the duty, were ſeized and confiſcated.

There being a remarkable decreaſe of this duty, occaſioned by the conſuming of much leſs wine in taverns, and much more in private houſes than formerly, the Magiſtrates, by an act of council, in *Auguſt* 1751, diſcharged the granting of any ſuch *gratis* warrants for the future, till the prohibition ſhould be taken off by another act of council, except to ſuch as are exeemed from impoſt by law, (*viz.* the members of the college of juſtice.)

Many of the inhabitants, imagining that it was not in the power of the Magiſtrates to exact impoſt upon wines imported into the city and liberties, for private conſumpt, reſolved to have the queſtion tried; and in order thereto, Sir *Robert Myreton*, having bought a parcel of wine at *Dalkeith*, applied to the Magiſtrates of *Edinburgh* for a *gratis* warrant, for importing it into *Edinburgh*; which being refuſed to him, he brought his wine to the port, where it was ſeized, and he charged for the duty.

Upon this, Sir *Robert* preſented a bill of ſuſpenſion to the court of Seſſion, and alledged, that, by the words of the grant, the duty was only impoſed upon wines and others, *importan. et venden. intra dictam civitatem de Edinburgh, vel quaſvis libertates ejuſdem.* And tho' the duty be payable *per venditores et cunctos alios invectores dicti vini*, yet *the ſaid wines* are only ſuch as had been mentioned in the granting clauſe, *i. e.* wines imported and ſold within the city and liberties; ſo that, in order to intitle the town to the duty, it was neceſſary that the wine ſhould be both imported and ſold; that this was agreeable to the genius of the law of *Scotland* in like caſes; for, by act 251. Par. 1597, cuſtoms were payable to the Crown only for goods imported for ſale, but, gentlemen, importing foreign commodities for their own uſe, were liable to no cuſtom. And, when duties upon merchandize imported into *Scotland* were granted to King *Charles* II. during his life, to be levied by way of exciſe, the duty was not made payable by the importer, in reſpect of the importation, but by the retaler, or firſt buyer after importation, as appears from 14. act, Par. 1661.

2*dly*, He alledged that it had been the uniform conſtruction of the grant from its date to *Auguſt* 1751, that the duty was only to be levied upon wines imported into the city for ſale; for, as often as any wines were imported for private conſumpt, *gratis* warrants had been granted, not as a matter of favour, but as of right; and the Magiſtrates could not now alter the cuſtom, and put a different conſtruction on the grant, which was in effect to make a new one.

*Anſwered* for the chargers: That the ſuſpender's conſtruction of this grant, *viz.* that both importation and ſale muſt concur, in order to give the town a title to the impoſt, would imply the greateſt abſurdity; for he muſt admit, that, by the ſtricteſt interpretation of the words, wines bought at *Leith* and imported into *Edinburgh*, whether for ſale or private

 conſumpt,

conſumpt, are liable to the duty; and, if wines bought at *Dalkeith*, *Muſſleburgh*, or any where elſe, without the liberties of the town, and afterwards brought into the town, are not alſo liable, the grant would only have the effect to ruin the town's own port, *viz.* the port of *Leith*, but would bring in no revenue to the town, as every one would purchaſe his wines at places without the limits of the grant; but from the whole tenor of the grant, it is evident, that the duty is impoſed upon all wines conſumed within the city of *Edinburgh*, or liberties, where-ever the wine was bought: this appears from the narrative of the grant, which ſets forth the neceſſity of impoſing a duty, *ſuper vino aliiſque exteris commoditatibus IMPORTANDIS*; and from the executive clauſe, ordaining letters of horning to paſs for payment of the duty, *ſuper pincto dicti vini IMPORTAND. omni tempore futuro, per venditores et INVECTORES dict. commoditatum.*

And the genius of our law in theſe matters, is by no means ſuch as the ſuſpender repreſents it; for by act 206, Par. 1594, a duty was payable to the crown on all wines imported into the kingdom, and that within ten days after importation, tho' not retaled or ſold; and, by the act 14. Parl. 1661. cited for the ſuſpender, the duty thereby impoſed is payable by the importer, and ſalt-maker, for what they conſume themſelves.

Further, That at the date of the grant, it was underſtood to impoſe a duty on all wines conſumed within the town, appears from the decreet of declarator, obtained by the members of the college of juſtice againſt the town of *Edinburgh* in 1687, whereby, amongſt other things, the members are declared free from payment of this duty.

And with reſpect to the uſage of granting *gratis* warrants, *anſwered*, The applying to the Magiſtrates for theſe, was an acknowledgment that the wines were liable to the duty; and that, in order to free them therefrom, it was neceſſary to apply to the Magiſtrates for an indulgence; and the granting of theſe for any term of years could no more free the inhabitants from the duty, or oblige the Magiſtrates to continue the indulgence, than if an heritor had yearly granted to another, on his applying for it, a liberty of caſting peats in his moſs, which could never conſtitute a ſervitude, or oblige the one to continue the favour to the other any longer than he pleaſed.

" The Lords repelled the reaſons of ſuſpenſion, and found the letters " orderly proceeded." B

For the Chargers *Advocatus*. For the Suſpender, *Ro. Craigie*. Reporter Lord *Minto*. Clerk *Gibſon*.

## N° LIV. 26th *December* 1752.

Captain *CHARLES URQUHART* of *Birdſyards*

againſt

*ALEXANDER TULLOCH* of *Tannachy*.

THE lands of *Tannachy* are thirled to no mill; but there being no place proper for erecting a mill on theſe lands, *Alexander Tulloch*, the proprietor, purchaſed a ſmall piece of ground lying within the royalty of *Forres*, and began to erect a corn-mill thereon.

The

The burgh of *Forres*, and whole territory thereof, is thirled, both for the *grana creſcentia* and *invecta & illata*, to the mills of *Forres*, belonging in property to *Urquhart* of *Birdſyards*; who, as ſoon as *Alexander Tulloch* began to erect the mill, obtained a ſuſpenſion of the work, and brought a declarator to have it found that *Alexander Tulloch* had no right to erect a corn-mill within the bounds of the purſuer's thirlage.

*Pleaded* for the defender, That, from the nature of property, a proprietor is authoriſed to do whatever he pleaſes *in ſuo*, and conſequently to build mills on his own lands, unleſs reſtrained by law. Now, there is no ſuch reſtraint implied in the ſervitude of thirlage, as appears from *Craig*, *lib.* 2. *dieg*, 8. § 8.; at leaſt, whatever may be the caſe where a ſuperior feus lands to his vaſſal, and reſerves the aſtriction to his own mill, yet, where thirlage is acquired by contract or preſcription, as in the preſent caſe, over lands not held of the proprietor of the mill, the proprietor of the aſtricted lands, if there is nothing ſpecial in the contract or poſſeſſion, cannot be reſtrained from erecting mills thereon for grinding corns not thirled. And the defender offered to bind himſelf under a penalty not to grind at the new mill any corns aſtricted to the purſuer's mills, and to find caution for that effect.

*Anſwered* for the purſuer, That the ſervitude of thirlage implies in its own nature a reſtraint upon the proprietor of the ſervient tenement from building a mill thereon; and thus far his property is limited. This is expreſsly aſſerted by Lord *Stair*, *tit. Servitudes*, *ſect.* 23. and has been ſo found by the Lords as often as the queſtion has been brought before them, particularly in two caſes obſerved by *Fountainhall*, 28th *February* 1684, *Macdouall contra Macculloch*, and 28th *February* 1695, *Crawfurd contra* Sir *John Schaw*. Whatever was the opinion of *Craig*, the point has been otherwiſe ſettled ſince his time; and for this there appears good reaſon, becauſe erecting mills within the thirl, on pretence of grinding only outſucken corns, would open a door to daily frauds.

With reſpect to the caution offered by the defender, *anſwered*, That the purſuer is not obliged to accept thereof, and it would occaſion perpetual law-ſuits betwixt the parties.

" The Lords found, that the defender could not erect a corn-mill with-
" in the bounds of the purſuer's thirlage." B

Act. *Ro. Craigie.* Alt. *H. Home.* Reporter, Lord *Dun.* Clerk *Forbes.*

N° LV. 26th *December* 1752.

## The CREDITORS of *GRAHAM* of *Moſsknow* againſt *ROBERT GRIERSON.*

IN the ranking of the creditors of *Graham* of *Moſsknow*, there was an intereſt produced for *Robert Grierſon*, *viz.* a bond for 900 merks, dated in 1683, granted by *Robert Telfer* as principal, and *William Graham* of *Moſsknow* as cautioner, to Sir *Robert Grierſon*; and a bond of corroboration thereof by the ſaid *William Graham* to the ſaid Sir *Robert*, dated in 1699, together with an adjudication of the eſtate of *Moſsknow* on the ſaid grounds of debt: to all which *Robert Grierſon* had right by progreſs.

The

The other creditors *objected* to this intereſt, That the original bond is null in terms of the act 1681, in regard that *John Agnew*, one of the witneſſes, is deſigned brother-german to *William Irvine* of *Bonſhaw*; whereas he was not brother-german, but brother-in-law to him; and as this was a falſe deſignation, or one which did not agree to *John Agnew*, it could not be conſidered as a deſignation of the witneſs in terms of the act, or make the bond in a better caſe than if *John Agnew* had not been deſigned at all.

*Anſwered* for *Robert Grierſon:* That the act 1681, was intended to prevent forgery, but not to cut down bonds, truly executed, upon niceties and criticiſms; and ſeeing *conſtat de perſona*, and that *John Agnew* is deſigned, the bond is not null in terms of the ſtatute, tho' part of the deſignation does not agree to the witneſs: had he only been deſigned brother to *Bonſhaw* it would have been ſufficient; and therefore the addition of brother-german, in place of brother-in-law, cannot annul the bond. 2*dly*, The bond is homologated by the bond of corroboration.

*Replied* for the other creditors: That the homologation can have no effect in this caſe, becauſe *Graham* of *Moſsknow* was only cautioner in the original bond: the principal debtor did not join in the corroboration, and therefore the original bond ſtill remained null with reſpect to him; and conſequently the cautioner could not be bound.

X "The Lords found the bond void and null." B

For *Robert Grierſon*, *Hay*. For the other creditors, *Ja. Erſkine Junior*. Clerk *Murray*.

N° LVI. 2d *January* 1752.

*MARY BURN*

againſt

*ALEXANDER OGILVIE* Merchant in *Dundee*, and his Children.

A Legacy of 4000 merks was left to *John*, *James*, *Alexander*, *Mary* and *Jean Burns*, children of *John Burn* of *Middle-mill*. *John*, the eldeſt of the legatees, uplifted the legacy for himſelf, and as factor for his brothers and ſiſters. *James* and *Alexander* went to ſea, and *James*, before he went abroad, executed a teſtament, nominating *John* his executor and univerſal legator.

*John* made a will in favours of his ſiſter *Jean*, and died in 1734; *Jean* was married to *Alexander Ogilvie*, and died in 1743, leaving children.

In 1744, *Mary Burn* was decerned executrix to her two brothers *James* and *Alexander*; ſhe had ſet forth in the edict, that *James* died in *Bombay*, in *April* 1743, and that *Alexander* died upon the coaſt of *Spain*, in *July* ſaid year. Upon this title ſhe brought an action againſt *Alexander Ogilvie* and his children, as repreſenting the deceas'd *Jean Burn*, to make payment to her of *James* and *Alexander Burns*'s ſhares of the above mentioned legacy; and ſhe produced ſome letters from people in this country, all dated after the decreet-dative, and ſome of them after the commencement of this proceſs, bearing, That it was reported *James* had died in *Perſia* in 1744, and that *Alexander* had, together with the whole crew of the ſhip, been murdered by the *Spaniards* in the bay of *Campeachy*, in 1744, or 1745.

*Pleaded*

*Pleaded* for the defenders: That before the purſuer can draw any ſums of money from them, in right of her ſaid brothers, ſhe muſt prove that her ſaid brothers are dead. The decreet dative is no evidence of the deaths, for ſuch decreets paſs of courſe without any proof; and as *James* and *Alexander* are ſaid to have died abroad, and as their deaths are not notour, it is incumbent on the purſuer to bring evidence thereof, the rather that this is not the caſe of a debtor, who has no other intereſt than to pay ſafely, but of defenders who may have a joint intereſt in the effects; and therefore,

2*dly*, The purſuer muſt alſo prove the time of their deaths; for, if *James* died before his brother *John*, the purſuer can have no ſhare of any thing which belonged to *James*, becauſe of his will in favour of *John*; and, if *Alexander* predeceas'd *John*, the purſuer can only have a third of what belonged to him; and, if *James* and *Alexander* ſurvived *John*, but died before their ſiſter *Jean*, the purſuer can only claim one half of their ſhare of the legacy; for ſuch part of it as would have belonged to *John* and *Jean*, as neareſt of kin to their deceas'd brothers, was veſted in them, and tranſmitted without confirmation, becauſe *John*, by uplifting the 4000 merks, and afterwards *Jean*, by being executrix to him, were debtors to their ſaid brothers for their reſpective ſhares, and, on the death of their brothers, became both debtor and creditor in ſuch ſhare as fell to themſelves, which therefore needed not to be confirmed. And as to the letters produced as evidence of the death, alledged that they could have no weight, as they were impetrate during the dependence of this proceſs, contained nothing but hearſay, and even contradicted the account of the deaths given in the edict; and if any thing material were contained in the letters, the writers of them ought to be examined as witneſſes in the cauſe.

*Anſwered* for the purſuer: That the decreet dative is ſufficient preſumptive evidence of the deaths, unleſs the defenders will undertake to prove that *James* and *Alexander* are alive; and it would be extremely hard, if an executor, in every proceſs he had againſt the debtors of the defunct, were obliged to prove the death. And with reſpect to the time of the death, it ſurely is incumbent on the defenders to prove, if they aver it, that *James* or *Alexander* predeceas'd *John* or *Jean*; for the defenders are actors in that exception, and therefore muſt prove their alledgeance. Alſo the purſuer referred to the letters as evidence of the deaths, and time thereof.

" The Lords found that the purſuer muſt prove the death of *James* " and *Alexander Burns*, or that they were *habite* and *repute* dead. And " found that the letters produced were not ſufficient evidence there- " of."

*N. B.* The Lords waved determining on whom the proof of the time of the deaths would lie, till after the proof of the deaths ſhould be reported.

B

Act. *H. Home.* Alt. *Lockhart.* Clerk *Gibſon.*

N° LVII. 19th *January* 1753.

*WILLIAM HALL* of *Whitehall*, Eſq;

againſt

*ARCHIBALD MACAULAY* and *PATRICK LINDSAY* Merchants in *Edinburgh*.

LORD *Kimmergham*, one of the ordinary Lords of Seſſion, died in 1730, and the mournings for his widow, children *in familia*, and ſervants, were furniſhed by *Archibald Macaulay* and *Patrick Lindſay*, who, after the lapſe of ſix months from Lord *Kimmergham*'s death, confirmed themſelves executors *ad ommiſſa*, before the Commiſſaries of *Edinburgh*, within whoſe juriſdiction the defunct reſided during the ſitting of the court of Seſſion, and within whoſe juriſdiction he died; and gave up, in the inventory, the defunct's library omitted out of a former confirmation.

Soon after, Mr. *William Hall* of *Whitehall*, being creditor to the defunct, alſo confirmed himſelf executor *ab ommiſſa*, and gave up the ſaid library in inventory, but expede his confirmation before the Commiſſary of *Lauder*, within whoſe juriſdiction the defunct's eſtate and family ſeat were ſituated, and where the goods confirmed lay. The books were, by conſent of parties, ſold, and a competition before the court of Seſſion enſued, which depended on two points; 1*ſt*, which of the confirmations was preferable. 2*dly*, Whether the mournings furniſhed to the defunct's family were part of the funeral expences, and, on that account, a privileged debt on his eſtate.

The Lords, 17th *July* 1733, "Found the confirmation at *Lauder* "preferable to that at *Edinburgh*; and remitted to the Ordinary to hear "parties Procurators, how far mournings furniſhed to the children and "ſervants, in competition with creditors, are privileged and preferable "debts."

After this, of conſent, Mr. *Hall* uplifted the price of the books, and granted an obligation to the merchants, to pay whatever ſums of money ſhould be determined to be paid them out of the price, in the event of diſcuſſing their preferences; and alſo, gave to Mr. *Macaulay L.* 70 *Sterling*, and to Mr. *Lindſay*, *L.* 35 *Sterling*, being the amount of their accompts, but took their bills for theſe ſums.

After Mr. *Hall*'s death, *William Hall*, his executor, brought a proceſs againſt Meſſ. *Macaulay* and *Lindſay* for payment of the ſaid bills; which was remitted to, and conjoined with the competition above mentioned.

It was *pleaded* for the defenders: That, as, by the laws of all nations, funeral-expences are a privileged and preferable debt on the defunct's eſtate, ſo whatever, by the cuſtom of the country, is decent and ordinary to be laid out on a funeral of perſons of the defunct's rank, is conſidered as part of theſe expences, and intitled to that privilege, tho' the defunct died inſolvent: and therefore, as, by the cuſtom of this country, there ought in decency to be mourners at the funeral of one of Lord *Kimmergham*'s rank and ſtation, and that his widow, children, and domeſticks, who were to bear a part at the funeral, either within or without doors, ought in decency to be in mourning: and as a huſband is liable for his widow's mournings, a father for the cloaths of whatever kind furniſhed to his children *in familia*, and a maſter pays for the mournings into which he puts his ſervants,

vants, all theſe mournings muſt, as a part of the funeral-expences, have a privilege and preference on the defunct's eſtate.

*Anſwered* for the purſuer: That, tho' mournings furniſhed to the widow and children be a debt upon the defunct's executry, yet it is only ranked in the third place, that is, after the privileged debts, and thoſe owing to other creditors; the law gives the widow and children no preference, even for their aliment to the firſt term, and ſtill leſs will it indulge a preference for ſuch cloaths and apparel as the defunct's rank would have made proper for them, if he had left effects for that purpoſe: formalities of this kind cannot come in competition with the juſtice which is due to creditors: the funeral-expences are indeed privileged; but theſe go no further than is neceſſary for performance of the funerals, *ne inſepulta cadavera jacerent*, and cannot be extended to furniſh thoſe who are connected with the defunct with every thing that may be requiſite for their appearing ſuitably to his rank in the world after his deceaſe; and, in eſtimating funeral-expences, regard muſt be had to the defunct's eſtate, as well as to his rank and ſtation, *l.* 14. § 6. *ff. de relig. et ſumpt. funerum.* Beſides, the accompts contain ſeveral articles of mournings which would not be uſed at the funeral; the widow was in the country, and, tho' ſhe had been in town where her huſband died, by the cuſtom of this country, would not have attended the funeral.

*Obſerved* from the bench; That the expence of hanging the room where the corps ly, with black, is certainly part of the funeral-expences, and *multo magis* the mournings for the children and ſervants, who are to bear a part at the funeral; but mournings to the relict, or ſuch children who are not preſent at the funeral, make no part of theſe expences.

" The Lords ſuſtained the defence, reſerving to the purſuer to be " heard upon what of the articles in the accompts were not uſed at " or before the interment." B

Act. *Ja. Ferguſon.* Alt. *R. Craigie.* Clerk *Pringle.*

N° LVIII. 23d *January* 1753.

Mr. *DAVID GREGORY*, Profeſſor of Mathematicks in the Univerſity of *St. Andrew's*,

againſt

*WALTER WEMYSS* of *Lathocker.*

AS Mr. *Gregory*, attended by one *Baird*, was beating about for game on the lands of *Leuchars*, Mr. *Wemyſs*, a neighbouring heritor, came up and ſeized the fowling-piece which *Baird* carried. *Gregory* inſiſted, before the Sheriff-depute for the county of *Fife*, that the fowling-piece, as being his property, ſhould be reſtored to him. The Sheriff found, *That it was unwarrantable in* Wemyſs *to ſeize the gun libelled*; *and therefore found him liable in reſtitution of it, in as good caſe as when he took it.*

*Wemyſs* advocated the cauſe, and *pleaded*, That *Baird* was a common fowler, and had no licence to ſhoot from the proprietor of the lands of *Leuchars*, and therefore that he was within the 13th act, Parl. 1. Queen *Anne*,

*Anne*, which provides, That *no common fowler ſhall preſume to hunt on any grounds, without a ſubſcribed warrant from the propriet rs of the ſaid grounds, under the penalty of L.* 20 Scots, *beſides forfeiting their dogs, guns, and nets, to the apprehenders or diſcoverers.* That, if the forfeiture of the dogs, guns, and nets, mentioned in the ſtatute, had been given *only* to the diſcoverer, or other proſecutor who ſhould ſue for them in the courts of law, the purpoſe of the legiſlature to preſerve the game would have been ineffectual: for that, if common fowlers (who are generally vagrants, their perſons little known, and the places of their abode uncertain) ſhould once eſcape, it would be difficult to bring them to juſtice; therefore it is that the legiſlature, introducing another remedy, at once more ſummary and more effectual, has permitted their dogs, guns, and nets, to be *brevi manu* apprehended, and thereby forfeited to the apprehenders: agreeable to which interpretation of the ſtatute, the univerſal practice has been, and no action of damages has ever been brought by any common fowler, whoſe dogs, guns, or nets, have been ſo forfeited; from all which, *Wemyſs* ſubſumed, that he had the authority of law for what he had done.

*Pleaded* for *Gregory:* The words of the ſtatute, *apprehenders* or *diſcoverers*, are evidently ſynonymous terms, and relate to a legal proſecution: were a ſummary apprehenſion and forfeiture permitted, the cognizance of the offence would be veſted in the perſon to whom the benefit ariſing from the penalty would accrue; a regulation ſo contrary to the genius of law in general cannot be introduced, otherwiſe than by expreſs ſtatute.

" The Lords repelled the reaſons of advocation, and remitted the " cauſe.

D

Act. *R. Mackintoſh.* Alt. *R. Dundas.* Reporter Lord *Elchies.*

N° LIX. 3d *February* 1753.

*WILLIAM DOUGLAS* Eſq; and *THOMAS BELSCHES* his Truſtee

againſt

Mrs. *ISOBEL DOUGLAS* of *Kirkneſs.*

*William*, Earl of *Morton*, in 1595, granted a charter of the lands and barony of *Kirkneſs*, to be holden of himſelf, in favour of *George Douglas* his ſecond ſon, and the heirs-male of his body; whom failing, to return to the Earl of *Morton* and his heirs; and upon this charter, the ſaid *George Douglas* was infeft.

In 1607, *William*, then Earl of *Morton*, granted another charter of the foreſaid barony, to the ſaid *George Douglas*, then Sir *George*, and therein deſigned the Earl's uncle, and to his heirs and aſſigns whatſoever; upon which charter Sir *George* was alſo infeft.

*Archibald Douglas*, ſon to the ſaid Sir *George*, never made up any titles to the eſtate; but *William*, Earl of *Morton*, having acquired right to certain appriſings affecting the ſame, in *December* 1638, a contract was entered into betwixt the ſaid Earl, and *Robert*, Lord *Dalkeith*, his ſon, on the one

one part, and *William Douglas*, ſon to the ſaid *Archibald Douglas*, on the other, whereby it was agreed, in conſideration of the lands of *Foſſoquhie* and others, which the ſaid *William Douglas* obliged himſelf to diſpone to the Earl, that the Earl ſhould renounce the appriſings which he had affecting the eſtate, and ſhould grant a charter of the ſaid lands and barony, " in favour of the ſaid *William Douglas*, and the heirs male of his body; " whom failing, to return back again to the ſaid Earl and Lord, their " heirs, ſucceſſors, and aſſignies." And the contract contains a clauſe, " de- " claring, that it ſhall be no ways leiſum nor lawful to the ſaid *Wil- " liam Douglas* of *Kirkneſs*, or his heirs male foreſaid, to ſell annailzie or " diſpone the foreſaid lands and barony of *Kirkneſs*, or any part thereof, " to and in favour of any perſon or perſons whatſomever, directly or indi- " rectly, in hurt, prejudice, or defraud of the ſaid noble Earl and Lord, " and their foreſaids, anent their ſucceſſion of the ſame, failing of the " heirs male, lawfully begotten of the ſaid *William Douglas* his own " body, as ſaid is, in manner above written." And the ſaid *William Douglas* obliged himſelf to accept from the Earl a precept of *clare conſtat*, as heir to his grandfather Sir *George*, in the ſaid lands, to infeft himſelf therein, and to reſign the ſame in the Earl's hands, and take a charter from him in terms of the contract.

In purſuance of this contract, the Earl, 6th *April* 1639, granted a charter to the ſaid *William Douglas*, of the ſaid lands, containing the clauſe of return and prohibitory clauſe above recited, upon which *William Douglas* was infeft in ſaid year.

The ſaid *William Douglas* was ſucceeded by his ſon, alſo named *William*, who, having died in 1682, was ſucceeded by his ſon, Sir *Robert Douglas*.

Some time before that period, Sir *William Bruce* had acquired right to the greateſt part of the Earl of *Morton*'s eſtate; and amongſt others, to the ſuperiority of the lands of *Kirkneſs*; and, in 1686, Sir *Robert Douglas* obtained from Sir *William* a precept of *clare conſtat*, for infefting him as heir to his father in the ſaid lands of *Kirkneſs*.

In 1687, Sir *Robert* reſigned the ſaids lands in the hands of Sir *William Bruce*, in favour, and for new infeftment to be granted to him, *and his heirs and aſſignies whatſoever*; and Sir *William* thereupon granted a charter of reſignation, containing a *novodamus*, upon which Sir *Robert* was infeft, 19th *April* 1689.

Sir *Robert* was ſucceeded by his ſon, General *Douglas*, and, in 1741, the General diſponed the ſaid lands and barony of *Kirkneſs*, failing heirs of his own body; in favour of Mrs. *Iſobel Douglas* his eldeſt ſiſter, and the heirs of her body; whom failing, to his other ſiſters, and the heirs of their bodies *ſucceſſivé*. After his death, the ſaid Mrs. *Iſobel Douglas* obtained a charter of reſignation from Sir *John Bruce* the ſuperior, in virtue of the procuratory in her brother's diſpoſition, and was thereupon infeft 22d *November* 1748.

*William Douglas*, grandſon to *William Douglas* the ſecond, of *Kirkneſs*, and heir-male to him, failing the ſaid Sir *Robert Douglas*, and the iſſue-male of his body, being adviſed that he, as heir-male to the eſtate of *Kirkneſs*, was intitled to quarrel and ſet aſide the ſettlements made in favour of the ſaid Mrs. *Iſobel Douglas*, as contrary to the original grant of the eſtate in 1595, and to the ſaid contract and charter following thereupon in 1639: he, for that end, granted a truſt-bond to *Thomas Belſches*, who thereupon brought an adjudication of the barony of *Kirkneſs*. The

ſaid Mrs. *Iſobel Douglas* compeared and oppoſed the adjudication upon her titles to the barony, but agreed that her right ſhould be tried in this ſtate, as if the purſuer had compleated his adjudication, and brought a reduction of the ſettlement in her favour.

It was *pleaded* for the defender; *firſt*, That the clauſe of return contained in the original grant in 1595, was allenarly in favour of the Earl of *Morton* and his heirs, and eſtabliſhed no right or claim to the heirs-male of Sir *George Douglas*; but, as that return was diſcharged by the charter 1607, and the lands given abſolutely to Sir *George*, his heirs and aſſignies whatſoever, there is now no place to plead on the original grant. That it is ſtill more evident, the return, ſtipulated by the contract 1638, gave no right to the heirs-male of *William Douglas*; the only parties contractors, in the year 1638, were the Earl of *Morton* and his couſin *William Douglas* of *Kirkneſs*, then unmarried; it was the Earl only who ſtipulated the return in favour of his own heirs and aſſignies, and took care to guard it by a prohibitory clauſe, that it ſhould not be lawful to *William Douglas*, or his heirs-male, to diſpone the lands in prejudice of the Earl and his foreſaids. Here there was no *jus quæſitum* to the heirs-male of *William Douglas*, nor were they made creditors by the clauſe; *William Douglas* might the next day have diſponed the lands in favour of the Earl, and ſo might his heirs at any time have diſponed them to the Earl's heirs, or diſponed them in any way they pleaſed, if the return was not thereby prejudged, for they were under no limitation in favour of the ſucceeding heirs-male, but only in favour of the Earl, his heirs and aſſignies.

2*dly*, The clauſe of return contained in the contract 1638, and charter which followed upon it in 1639, was provided to the Earl of *Morton*, *his heirs*, *ſucceſſors*, *and aſſignies*, the ſuperiors of the lands; and therefore it can be conſidered in no other view, than as a ſtipulation of that return which, by the antient feudal law, was underſtood to take place in favour of the Over-Lord, upon the failure of the vaſſal's heirs called by the inveſtiture: and if ſo, the family of *Morton* was diveſted of any claim they could have upon this clauſe, at the ſame time that they were diveſted of the ſuperiority of the eſtate; and this right of return went alongſt with the ſuperiority to Sir *William Bruce* and his heirs, who gave it up, and diſcharged it, by granting the charter 1687 to Sir *Robert Douglas*, *his heirs and aſſignies whatſoever*.

3*dly*, As the lands have been poſſeſſed far beyond the years of preſcription, *viz.* ſince 1687, upon titles deſcendible to heirs whatſoever, all claim which could be competent, either to the heir-male of the family of *Kirkneſs*, or to the Earl of *Morton* upon the contract 1638, is thereby excluded, and Sir *Robert Douglas*, and his heirs, thereby acquired right to an abſolute and unlimited fee, in terms of the 12th act of Parl. 1617, which declares, That infeftments followed by uninterrupted poſſeſſion for forty years, ſhall not be liable to challenge, at the inſtance of any perſon whatſoever, upon any ground, reaſon or argument competent in the law.

It was *anſwered* for the purſuer to the firſt defence, That where a father gives a land-eſtate to a younger ſon, limited to the heirs-male of his body, and, upon the failure of ſuch heirs, to return to himſelf and his right heirs, in ſuch a caſe, it is underſtood, that the eſtate in effect remains with the family, as an appenage, for the ſecond ſon, and the heirs-male of his body; and as the grant is ſo limited by the *donor*, it can be diverted to no other

other uſe, but muſt go to the heirs-male of the body of the ſecond ſon, while any ſuch exiſt; and, upon their failure, muſt return again to the family. Such was the grant of this eſtate by the charter 1595: and tho' in 1607 Sir *George Douglas* obtained a charter with a different deſtination; yet it is apparent, that this laſt ſettlement was diſapproved of by all parties intereſted therein; and the grant of the barony of *Kirkneſs* was, by the contract 1638, and charter thereupon, reſtored to its original tenor, and to the original intent of the grant. As the right competent to the granter and his heirs cannot gratuitouſly be defeated, ſo neither can the right competent to the heirs-male of the younger ſon; it was for their ſakes, and for ſupporting them as a ſeparate family, that the lands were originally granted. This was the primary intention of the *common parent*, and which he is preſumed to have had principally in his eye, and to wiſh that it might continue for ever, and the return is a ſecondary and unwiſh'd-for event; and therefore, if the law has ſecured the right of ſucceſſion in this laſt and undeſired event, becauſe of the intention of the granter, it muſt *à fortiori* ſecure the ſucceſſion to the heirs-male of the ſecond ſon's body. It is moſt abſurd to ſuppoſe, that remote ſubſtitutes, the *perſonæ minus dilectæ* ſhould have a ſtronger and greater intereſt in an eſtate, than thoſe who are confeſſedly the *prædilectæ perſonæ*, and who have the prior and preferable right, by the conſent of all parties. Beſides, if the eſtate were not kept in the channel of heirs-male, how ſhould the granter's heirs know when theſe failed, and when their own right commenced?

To the ſecond defence, *anſwered*, That, by the law of *Scotland*, the ſuperior did not ſucceed to the feu upon failure of the vaſſal and his heirs, but the King did, and ſtill does ſucceed as *ultimus heres*, *Stair. Inſt. lib.* 3. *tit.* 3. *in fine*; and the clauſe of return to the Earl of *Morton*, and his heirs, has no connection with the ſuperiority; it is but a right of ſubſtitution, which would have had the ſame effect ſuppoſing the Earl of *Morton* had diſponed the lands of *Kirkneſs* to his ſon, not to be holden of the Earl, but of the Earl's ſuperior; and conſequently the Earl of *Morton*'s being diveſted of the ſuperiority of theſe lands, does not affect the ſucceſſion of the vaſſal, neither in ſo far as conceived in favour of the heirs-male of the vaſſals body, or, upon their failure, in favour of the Earl of *Morton* and his heirs; for that right did not belong to the Earl as ſuperior, but as *donor* of the lands for a particular purpoſe.

Sir *William Bruce* could well acquire from the Earl of *Morton* the right of the ſuperiority of *Kirkneſs*, which was veſted in him, but could not acquire a diſtant hope of ſucceſſion, which had not opened to the Earl, and poſſibly never may; and therefore Sir *William Bruce* had no power to diſcharge the return, or alter the courſe of ſucceſſion. But, had the vaſſal's heir-male failed when General *Douglas* died, the Earl of *Morton* would have been intitled to have ſerved heir of proviſion to the General, and to have obtained an infeftment from the General's ſuperior.

To the third defence, *anſwered*, There were not here *termini habiles* for preſcription, it is implied in the notion of a poſitive preſcription, that one who is *non dominus* acquires the property by poſſeſſion, upon a proper title, but it is not intelligible how Sir *Robert*, or his ſon, could acquire a right of property in this eſtate by the poſitive preſcription, when they had the right of property antecedently veſted in them; and as the eſtate has been uniformly poſſeſſed ſince the date of the contract by heirs-male deſcended of the body of Sir *William Douglas* till the 1747, it cannot be maintained that the right of the heirs-male is cut off by the negative

tive preſcription. Sir *Robert* and his ſon could not, in their character of heirs of line, preſcribe againſt themſelves in their character of heirs-male; no preſcription could commence till the lines divided, which only happened in 1747, and, till that period, the remoter branch of heirs-male were *non valentes agere*, and therefore no preſcription could run againſt them. The remoter branch had not acceſs to look into the charter-cheſt of the preferable branch, or to know upon what title they poſſeſſed the eſtate; and, tho' they had known of the charter of reſignation 1687, and infeftment following upon it, yet it was neither competent nor neceſſary for them to have brought a reduction of the infeftment; Sir *Robert*, and the heirs-male of his body had a preferable title to the eſtate; and the remoter branch, the purſuer's grandfather, could have had no benefit by ſuch an action; for, ſuppoſe he had ſo far prevailed as to obtain a decreet, finding that the infeftment was irregular, and that the ſame ought to have been granted to Sir *Robert*, and the heirs-male deſcended of the body of his grandfather Sir *William Douglas*, yet this would not have hindered Sir *Robert* to have made a new reſignation in his ſuperior's hand, in the ſame terms with the former; and this could only have been ſet aſide by a ſecond action, and ſo on without end; our law does not authoriſe, much leſs require ſuch actions to be carried on, where the purſuer has no eſtabliſhed intereſt, and where the effect of the action muſt be ſo ineffectual

It was *replied* for the defender, in ſupport of the firſt defence, That it is in vain for the purſuer to argue upon the clauſe of return contained in the original grant, for that clauſe was diſcharged by the charter 1607; ſo that, at the time of the contract 1638, the eſtate of *Kirkneſs* was no appenage, nor burthened with a clauſe of return, but was the abſolute and unlimited property of *William Douglas*; and therefore the return ſtipulated by the contract can have no ſtronger effect, than if ſuch a contract had been entered into with a ſtranger who never had right to the lands. And it is evident, that the parties to the contract 1638 had no intention to create a limitation in favour of the heirs-male of *William Douglas*; for the prohibitive clauſe, by which the return is guarded, is allenarly in favour of the Earl and his heirs, " That it ſhall not be lawful to *William* " *Douglas*, or his heirs-male, to ſell, *&c.* in prejudice of the Noble " Earl and his foreſaids." And, tho' the heirs-male of *William Douglas* be called before the Earl of *Morton* and his heirs, and that the ſubſtitution in favour of the Earl could not be gratuitouſly defeated, yet it will not from thence follow, that any right was created to the heirs-male; for inſtances of this kind often occur, particularly in marriage-ſettlements, where land-eſtates are provided to the heir-male of the marriage, whom failing to the heir-male of an after marriage, whom failing to the heir-female of the marriage then contracted; the heir-female in ſuch a caſe has a right which cannot be diſappointed by the father, but tho' the heirs-male of a ſecond marriage are preferred to her, and as it were *in conditione poſiti* before her right can take place; yet it is undoubted, that the father is under no limitation in favour of ſuch heir-male, but, on failure of his male-iſſue of the firſt marriage, may give his eſtate to any of the ſons of the ſecond marriage he has a mind.

*Replied* in ſupport of the ſecond defence, That the right which the Earl of *Morton* and his heirs had by the clauſe of return, was altogether different from an accidental hope of ſucceſſion, which depends intirely on the

the will of the proprietor; for the Earl was creditor by the clauſe, and was intitled to name his own heirs and aſſignies, who were to be benefited by it. And whatever may be the preſent conſtitution of our law, it is certain, that the return was no other than what antiently was underſtood to be implied in the ſuperior's right, *Feudorum*, *lib.* 1. *tit.* 14. § 2. and is obſerved to be ſo by *Craig*, *lib.* 2. *dieg*, 17. § 11. It is ſufficient for the defender to ſhow, that as ſuch was the antient feudal law, ſo it was ſtill conſidered as our law at the date of the contract, and for long after it, by ſome of our ableſt lawyers, *Dirleton*, *title*, *Limitation of fees:* and therefore the return provided by the contract 1638, muſt be underſtood to be connected with the ſuperiority, and tranſmitted *ſimul et ſemel* with it to the purchaſer.

*Replied* in ſupport of the third defence, That nothing can be a more proper effect of preſcription than to cut off burdens or limitations, under which third parties might have claimed againſt the poſſeſſor, or his heirs-general; and to render the titles of his poſſeſſion for ever free and ſecure from all challenge on ſuch pretence in any time coming: in ſuch a caſe, the heir-male is not excluding his own right by preſcription, for he had no right by theſe preſcribed titles, but what he has more amply, by thoſe on which he founds his poſſeſſion; and he is not here preſcribing againſt himſelf, but againſt the perſons intereſted in the limitations.

Neither can it be pretended, that the remoter heirs-male were *non valentes agere*, ſo long as the prior line of heirs-male ſubſiſted; for, if the ſubſtitution to heirs-male be underſtood to make them creditors, (which muſt be ſuppoſed in this argument) then it was certainly competent to any heir-male to challenge an alteration of the inveſtitures to his prejudice as ſoon as it was made, and to require it to be reſtored to the antient channel. The remoteſt ſubſtitute may even declare an irritancy againſt the preſent poſſeſſor, and much more may he inſiſt that the poſſeſſor rectify any breach he has made in the inveſtitures, contrary to the obligation he was under. How ſoon the alteration was made, there was *actio nata* to every heir who was creditor under the former ſettlements, to correct the innovation made by the preſent heir; and the remoter heir might have raiſed a proceſs and uſed inhibition, or any other diligence to ſecure his right. But if the preſent heir continue to poſſeſs the eſtate upon unlimited titles, without challenge, for 40 years, the fee becomes abſolute and unlimited. If this were not the effect of preſcription, there would be no dealing in ſafety with any proprietors of lands, had they poſſeſſed upon the moſt unexceptionable titles for centuries backwards; for ſtill it is poſſible, that in ſome of their more antient titles, there might appear burdens conceived in favour of third parties, which had never been expreſsly diſcharged, or of which the diſcharges could not be recovered. But, as the defender's argument is founded on the expreſs words and meaning of the ſtatute, ſo it has been ſupported by the Lords deciſions as often as the caſe has occurred, particularly in the caſe of *Innes* of *Auchlunkart*, obſerved by Lord *Fountainhall*, 31ſt *December* 1695; and in the caſe of *Macdougal* of *Mackerſton*, decided 12th *July* 1739, in both of which it was found, that an eſtate poſſeſſed during the years of preſcription, upon abſolute and unlimited titles, deviſed in favour of heirs whatſoever, became thereby an unlimited fee deſcendable to ſuch heirs, and free of the limitations formerly conceived in favour of heirs-male,

altho' thoſe who poſſeſſed the eſtate, during that period, were the heirs-male as well as the heirs of line.

" The Lords repelled the reaſons of reduction, and aſſoilzied from " the proceſs of adjudication." *Affirmed*

*N. B.* In the above caſe, moſt of the Lords who ſpoke, were for ſuſtaining the firſt defence; they gave no opinion on the ſecond, and were unanimouſly for ſuſtaining the third; and therefore a queſtion was not put on each defence, but the interlocutor worded in the general terms above mentioned. B

Act. *Advocatus, Ro. Craigie, J. Grant, et alii.* Reporter Lord *Woodhall.* Alt. *Ferguſon, And. Pringle, Bruce, et alii.* Clerk *Gibſon.*

N° LX. 6th *February* 1753.

Duke of *ROXBURGH*, and his MAJESTY's ADVOCATE,

againſt

*WILLIAM CHATTO*, Feuar in *Kelſo.*

THE defender, who holds certain lands in feu of the Duke of *Roxburgh*, having been extrajudicially warned to pay up ſome arrears of feu-duties owing by him for theſe lands, pretended that his Grace was debtor to him in a larger ſum than that of the feu-duties demanded; for, that the late Duke of *Roxburgh*, by a writing under his hand, became bound for himſelf and his heirs, to grant a feu-charter, *gratis*, to *Thomas Chatto*, (father of the defender) and to other feuars therein deſcribed; as alſo to infeft and ſeize them in their reſpective feu-lands, at his own expence. The defender offered evidence to ſhow, that the expence of this infeftment exceeded the ſum demanded of him in name of feu-duties: and, tho' he refuſed to produce the principal obligation above mentioned, yet he delivered, what he called a copy of it, to the Gentleman who manages his Grace's affairs. A proceſs was nevertheleſs brought, at the inſtance of his Grace, before his Baron-Bailie, when a procurator appearing with a mandate from the defender, pleaded the ſame defence. The Baron-Bailie ordained the defender to produce the principal obligation, and, on his refuſal, decerned for payment of the feu-duties.

The Duke of *Roxburgh*, with concourſe of his Majeſty's Advocate, raiſed a reduction and improbation of the above writing; in which proceſs, certification was obtained againſt the defender, and the writing reduced and improved; but, as this ſentence could not affect the reſpective intereſts of the other feuars, in whoſe favour the obligation was ſaid to have been conceived, and as ſuſpicions of guilt in the premiſes appeared againſt the defender, his Grace inſiſted farther, that that principal writing was falſe, and forged; and that the defender was guilty actor, art and part of forging, or of uſing it, knowing it to be forged.

The defender *objected* to the competency of this purſuit, and *pleaded*, That the law has deviſed ſufficient ſecurity againſt falſe and forged writings, by the civil action of reduction and improbation: if the writings called

called for in ſuch action be produced, the purſuer may proceed to have them improved, and if the caſe ſo require, may have the uſers of them puniſhed as forgers: if the writings are not produced, certification is granted againſt them, they are held to be forged, and they are reduced and improved accordingly: but farther than this, the law has not proceeded; that, as in this caſe, the writing ſaid to be falſe and forged, is not produced, no *corpus delicti* appears, and conſequently it is not competent to proceed to trial of forgery; ſuch trial would be as incongruous as it would be to proceed to a trial of murder, when it did not appear that any perſon had been murdered: nor is there any precedent of a trial of forgery, where the writing, ſaid to have been forged, was not produced.

But a Copy was.

*Anſwered* for the purſuer: It is *the crime libelled*, and not *the thing* on which the crime is committed, which, in criminal proſecutions, conſtitutes the *corpus delicti*: thus, in trials of murder, the commiſſion of the murder muſt be libelled, but the production of the perſon murdered is not required: ſo alſo in this caſe, as the forgery of a certain writing is libelled, the production of the writing itſelf is not neceſſary: indeed, were it otherwiſe, the law would be daily eluded; and offenders, eſpecially forgers, ſcreened from puniſhment: for that, according to the poſition laid down for the defender, a forger might, at any time, by deſtroying the forged writing, prevent all poſſibility of proſecution. There are alſo two precedents in point for the purſuer; one in the caſe of Captain *Barclay*, mentioned by *Mackenzie*, *Criminal Law*, title, *Falſehood*, § 5. and more fully related by *Stair*, in his deciſions, 6th *July* 1669; *Barclay* againſt *Barclay*; and 20th *January* 1670, Lady *Towie* againſt Captain *Barclay*: and the other in the caſe of *Gilchriſt* and *Breadie*, determined about thirty years ago.

" The Lords repelled the objection." D

Act. *R. Dundas*, *R. Craigie*, *Binning*, & *Advocatus*. Alt. *A. Pringle*, & *Lockhart*. Clerk *Pringle*.

N° LXI. 7th *February* 1753.

## Sir *MICHAEL STEWART*
## againſt
## The Earl of *DUNDONALD*.

IN the year 1698, Mr. *William Cochran* of *Kilmaronock* granted a bond to Mr. *John Stewart*, the purſuer's father, in the following words, " *viz.* I Mr. *William Cochran* of *Kilmaronock*, for ane certain ſum of money, " payed and delivered to me, by Mr. *John Stewart* younger of *Blackhall*, " by thir preſents, bind and oblige me, *&c.* to content, pay, and deliver " to the ſaid Mr. *John Stewart* and his heirs, *&c.* the ſum of a hundred " guineas in gold, and that immediately, and ſo ſoon as I, or the heirs " deſcending of my body ſhall ſucceed to the dignities and eſtate of the " earldom of *Dundonald*." This bond was written by *Laurence Crawfurd* of *Jordanhill*, and witneſſed by Sir *James Smollet* of *Bonhill*, and *John Briſbane* junior of *Biſhopton*. At that time the eſtate of *Dundonald* ſtood ſettled upon *John* Lord *Cochran* and his heirs-male; whom failing, to his brother

ther Mr. *William Cochran*, the granter of the bond, and *John* had then two ſons alive.

The purſuer, in right of his father, brought his action upon this bond, alledging, that the condition of it had been purified in the 1725, when the ſucceſſion to the eſtate and dignities of *Dundonald* opened to the defender's father, who was the ſon of *Kilmaronock*.

The defender offered ſundry ſpecial defences; but when the caſe was reported to the Lords, it occurred to them, that the firſt queſtion was, whether action could lie upon ſuch a bond?

Upon that point, *pleaded* for the defender, That this was *pactum de hereditate viventis*, and *contra bonos mores*: and as a precedent in point, was mentioned the caſe of Doctor *Abercrombie* againſt the Earl of *Peterborough*, 13th *July* 1745, where the Lords reſtricted the purſuer's demand to the ſum advanced, with intereſt from the time of the advancement. The like judgment was given in two ſimilar caſes in *England*, *viz. Berny* verſus *Pit*, (*Vernon* vol. II. fol. 14.) and, *Wiſeman* verſus *Beeche*, (*Vernon* vol. II. fol. 121.)

*Replied* for the purſuer: That the bond in queſtion is properly a contract *do ut des*, and is of a ſimilar nature with bills of bottomry and inſurances, which are favourites of the law. That, 1*mo*, The bargain had all the appearances of being a fair one; for, altho' the ſum paid cannot now be proved, yet, at the date of the bond, *Kilmaronock*'s chance of ſucceſſion was ſo diſtant and uncertain, that a very ſmall ſum advanced was equal to 100 guineas to be returned on that event: beſides, *Kilmaronock* was no extravagant young heir, ſeeking to borrow money at any rate. Both he and Mr. *Stewart* were equally above all ſuſpicion of impoſing, or of being impoſed upon: and the witneſſes were gentlemen, who would not have ſet their names to any thing uſurious or unfair. The caſe of Doctor *Abercrombie* was intirely different; for there, advantage was taken of Lord *Mordant*'s circumſtances, to extort from him a bond, by which four times the ſum received was to be paid back, if he, a young man, ſhould outlive his grandfather, a man of 80 years of age. This was plainly an uſurious and deceitful loan, and ſuch as would have fallen under the *ſenatuſconſultum Macedonianum*.

In the next place, the condition of the bargain was no way unlawful, or *contra bonos mores*. The maxims and reaſons of the civil law concerning *pacta de hereditate viventis*, are by modern laws exploded. The *Majoratus* in *Spain*, *Les inſtitutions contractuelles* in *France*, entails in *England*, and tailzies in *Scotland*, are no other than *pacta de hereditate viventis*. Purchaſes of liferents, annuities upon lives, are daily bargains. In ſuch annuities one may inſert the name of a father, nay, of the King himſelf. Yet, in none of all theſe caſes doth the law ſuppoſe a *votum deſiderandae et captandae mortis alienae*. The law is above ſuch ſuſpicions. Lord *Stair*, *l.* 3. *tit.* 8. § 28. ſays, "All pactions and contracts, in relation to the "heritage of perſons living, are valid and ordinary in contracts of mar-"riage, *&c.*" See the caſe of *Akenhead* againſt *Bothwell*, 6th *July* 1630; ſee alſo the dictionary, vol. II. p. 23. and *Dirleton*, n. 327

*Triplied* for the defender: That as to the fairneſs of the bargain, it does not enter the caſe, ſeeing the ſum advanced does not appear; and tho' it did, no injuſtice is done if the purſuer get repetition to that extent. It was not upon that footing, or upon the circumſtances of the parties that the judgment was founded in *Abercrombie*'s caſe, but entirely upon the natural

natural turpitude of ſuch bargains, and upon the danger of admitting them in any ſhape. Inſurances, bills of bottomry, annuities on lives, purchaſes of liferent, tailzies, and other ſettlements are introduced in favour of commerce, or for the convenience of mankind by regulating ſucceſſions. But no argument of convenience or expediency can be brought to ſupport wagers of this kind, which generally import a *turpe votum* upon one ſide, a deſire to take an undue advantage upon the other, and at beſt, folly and raſhneſs upon both.

" The Lords found the bond in queſtion void and null; reſerving to " the conſideration of the Court, whether the purſuer ſhould have " repaied to him the money paid for the ſame, upon proving the " extent thereof." s

Act. *H. Home, W. Stewart.* Alt. *Ferguſon.* Reporter, Lord *Elchies.* Clerk *Kirkpatrick.*

N° LXII. 8th *February* 1753.

*JOHN BARBOUR* and *WILLIAM BLACKWOOD.*

againſt

*AGNES HAIR.*

*HUmphry Barbour*, by his teſtament, left ſome part of his moveable eſtate to his relations, and the reſt to his wife, the defender. After his death, ſhe had an univerſal intromiſſion with his writings; and, having been called before the Sheriff, at the inſtance of her huſband's executors, in an action of exhibition and delivery of them, ſhe acknowledged, upon oath, that ſhe had lodged them all, at the deſire of the executors, in the hands of a third party, excepting two bills, which her huſband, ſome days before his death, (he being then ill, but not bed-rid), took out from among his other writings, indorſed blank, and delivered to her, deſiring her to keep them for her own uſe. The Sheriff found that the bills belonged to the widow; the executors advocated the cauſe, and the defender having offered to prove the donation by witneſſes, a proof before anſwer was granted.

At adviſing of the proof, it was *pleaded* in point of relevancy for the purſuer: That a legacy is not properly granted by a blank indorſation of a bill, and altho' it were, could not be proved by witneſſes; for that, 1*mo*, It happens frequently, that perſons in trade have bills indorſed blank, lying by them at the time of their death; now the conſequences would be dangerous, were their widows, who may eaſily get poſſeſſion of ſuch bills, permitted alſo to acquire the property of them, merely upon proving, by the teſtimony of two witneſſes, a delivery and donation from the deceas'd. 2*do*, A legacy, as has been found, may not be conſtituted by bill; and this deciſion applies with no leſs force to an indorſation of a bill, which is a new draught upon the accepter, in favour of the indorſee; and as bills, and the method of tranſmitting them by indorſation, were introduced for the conveniency of commerce, therefore, when they are uſed, either as to their conſtitution or indorſation, for purpoſes not commercial, they cannot be probative. 3*tio*, A bill muſt neceſſarily ſpecify the name of the perſon in whoſe favour it is drawn, which a blank

indorſation does not; there is therefore more danger in permitting a legacy to be conſtituted by the blank indorſation of a bill, than by a bill itſelf; the intention of the party being evident in the firſt caſe, but not in the latter. To ſupply by witneſſes this defect in the conveyance, or to prove by their teſtimony that words expreſſive of a legacy were uttered by the deceas'd, would be contrary to the rules of our law, at leaſt when the legacy exceeds *L.* 100 *Scots*, as it does in the preſent caſe.

The defender *anſwered*, That none of theſe arguments could have any influence in the determination of the preſent queſtion; for that the two bills were indorſed blank, and delivered to her, not as a legacy, but as a *donatio inter virum & uxorem.* Had her huſband meant them as a legacy, he would have provided them to her in his will, which he had juſt then executed. Neither can it be ſaid that a legacy was here intended, becauſe the donation was made on deathbed, and might alſo have been revoked. A donation made on deathbed, is not neceſſarily a donation *mortis cauſâ*; for if it be abſolute, it will be deemed to be *inter vivos*, according to the rule in the civil law, *L.* 41. *D. de mort cauſ. donat. Eum qui abſolute donat, non tam mortis cauſâ, quàm morientem donare.* The huſband, it is true, had in this caſe a power of revocation; but that proceeded not from the nature of the thing, as in a donation *mortis cauſâ*, but from the condition of the parties, the donation being *inter virum & uxorem.*

From the evidence of the witneſſes produced, it appeared, that *Humphry Barbour* meant to veſt the property of the bills in his wife: and this circumſtance had perhaps ſome weight with the Court.

" The Lords found the bills in queſtion were properly conveyed to the " defender; and therefore ſuſtained the defence againſt the deli- " very."

D

Act. *Miller.* Alt. Sir *David Dalrymple.* Clerk *Juſtice.*

N° LXIII. 9th *February* 1753.

*JAMES HAY* Clerk to the Signet,

againſt

His MAJESTY's ADVOCATE.

Mr. *Adam Hay*, in 1726, executed an entail of his lands of *Aſſleid*, and others, in favour of *Adam Hay*, his grandſon by his eldeſt ſon *Andrew Hay*, then deceaſed, and the heirs-male of the ſaid *Adam*'s body; whom failing, to *James Hay* the tailzier's ſecond ſon, and the heirs-male of his body, under moſt of the uſual prohibitory clauſes, and a clauſe irritating the debts. But the tailzie neither contains any clauſe irritating the contraveener's right, nor a prohibition from ſelling.

Further, the tailzie was not recorded as directed by the act 1685; but a charter was expede upon it, on which no infeftment followed.

*Adam Hay*, upon the death of his grandfather, in 1727, attained poſſeſſion of the tailzied lands; and, having joined in the rebellion, in 1745, he was attainted of high-treaſon, and the lands were ſurveyed, by order of the Barons of Exchequer, in terms of the ſtatute of the 20th of the King.

*James*

*James Hay*, the tailzier's ſecond ſon, entered a claim to the Court of Seſſion, as directed by the ſaid ſtatute, praying the Court to find, " That " only an eſtate for life of the ſaid *Adam Hay* was forfeited to his Majeſty " by the ſaid attainder; and that, upon the death of the ſaid *Adam Hay*, " the lands of *Aſleid*, and others, will belong to the claimant."

His Majeſty's Advocate objected to the claim, 1ſt, That the tailzie was not recorded in terms of the act 1685, and therefore can have no effect againſt the crown, or againſt any third parties.

2*dly*, That there is neither any proviſion in the entail for irritating the contraveener's right in caſe of tranſgreſſing the prohibitions; nor any clauſe prohibiting to alien.

It was *pleaded* for the claimant, That this claim muſt be determined by the rules of the *Engliſh*, and not of the *Scots* law; for, by act 7*mo Annæ*, cap. 21. the treaſon-laws of *Scotland* were repealed, and the treaſon-laws of *England* ſubſtituted in their place: and, from the late judgment of the houſe of Lords, in the caſe of *Gordon* of *Park*, it appears, that with reſpect to forfeiture, entails in *Scotland* are to be conſidered as eſtates tail in *England*, to the conſtituting of which recording is not neceſſary; and as, by the law of *England*, the tenant in tail cannot forfeit the right of the remainder-man, becauſe no more is in the tenant in tail, but an eſtate for himſelf and his iſſue; ſo, from analogy, the heir of entail in poſſeſſion, cannot forfeit the right of a ſubſtitute, as was decided in the ſaid caſe of *Park*: and with great juſtice, for the ſubſtitute in an entail has a much ſtronger intereſt in the eſtate by the law of *Scotland*, than a remainder-man has by the law of *England*; the right of the latter may lawfully be defeated by fine and recovery; but the former cannot, and even tho' the entail be not recorded, and therefore a creditor or purchaſer contracting *bona fide* with the heir in poſſeſſion would be ſafe; yet there would lie an action at the inſtance of the ſubſtitute or remoter heir againſt the heir in poſſeſſion, to diſburden the lands of all deeds done contrary to the entail, or to repair the damage thereby done to the remoter heir. By the law of *Scotland* before the act, 7*mo Annæ*, the heir in poſſeſſion could not forfeit to the prejudice even of his own iſſue, becauſe he could not alienate from them; and ſeeing our entails are now put on a footing with eſtates tail in *England*, in ſo far as is prejudicial to the ſubject, they muſt alſo be on the ſame footing in ſo far as beneficial, and therefore muſt be effectual againſt the crown, tho' not recorded.

What has been already pleaded, may alſo ſerve to obviate the other objection to the claim, *viz.* that the tailzie contains no clauſe irritating the contraveener's right, nor prohibiting to ſell the lands; for, by the law of *England*, no ſuch clauſes are requiſite to the conſtitution of an eſtate tail, and the tenant in tail has a power of ſelling by fine and recovery.

But this claim would be good, tho it were to be judged by the law of *Scotland*; for as the tailzie remained a perſonal deed, and no infeftment ever taken on it, the right was limited by common law, by all the qualities and proviſions contained in the grant, independent of the ſtatute 1685, and therefore good againſt creditors; as was found by the houſe of Lords, in the caſe of the heir of tailzie, and the creditors of Sir *Robert Denholm* of *Weſtſhiels*; and conſequently would be good againſt a forfeiture.

And tho' the tailzie contains no clauſe irritating the contraveener's right, it is by no means a ſettled point, that therefore it would not be

good

good againſt creditors, for tho' it has been ſo found by this Court, yet the decree was varied by the houſe of Lords, in the caſe of the creditors of *Rickarton*, and has not been decided by this Court ſince that time: and what ever may be found in the caſe of onerous creditors, from the favour which is due to them; yet it ought not to be extended to forfeitures. *Laſtly*, a power of ſelling will not infer that the eſtate may be carried away, *ſi heres delinquendo contraxerit*.

It was *anſwered* for his Majeſty's Advocate, That the pains and penalties for high-treaſon muſt be regulated by the law of *England*; but when that law comes to be applied to the caſe of a *Scots* eſtate, the nature of ſuch eſtate can only be known from the law of *Scotland*. And therefore, when the queſtion is, whether or not an eſtate in *Scotland* be ſettled by a proper entail, ſuch as, from analogy, ought to ſave the right of the ſubſtitutes, as the right of remainder-men are ſaved? that queſtion can only be determined by the law of *Scotland*. By the ſtatute of *Weſtminſter* 2. it was provided, *Quòd voluntas donatoris, ſecundum formam in carta doni ſui, manifeſtè expreſſam obſervetur*. But, with us, a ſettlement tho' containing ever ſo many ſubſtitutions, is held to be no more than a ſimple dedeſtination alterable at pleaſure, unleſs the ſubſtitutions are fenced with prohibitory and irritant clauſes. And therefore, before one can plead before this Court, that the right competent to remainder-men by the law of *England*, ought to be extended to him, he muſt ſhow that he claims under an entail properly conſtituted according to the law of *Scotland*; to the conſtituting of which, it is neceſſary that the entail be recorded: and tho' there would lie an action of damages againſt the heir in poſſeſſion, who counteracted the tailzie, yet that is no argument againſt the forfeiture; for an heir of proviſion, by a contract of marriage, would have ſuch an action againſt his father, and yet the eſtate would forfeit by the father's attainder.

It will not avail the claimant in this caſe, that the entail remained perſonal; for *Adam Hay* the forfeiting perſon, was apparent heir to his grandfather in the lands, and poſſeſſed in his right of apparency, without regard to the entail; and conſequently his debts and deeds muſt affect the lands, notwithſtanding the limitations contained in the entail, which remained a latent deed, and was never acknowledged by the apparent heir as the title of his poſſeſſion.

Such being the caſe, there is no need for inſiſting on the other objection to the claim, *viz.* That the tailzie contains no clauſe irritating the contraveener's right, nor prohibiting to alienate: only on this head it may be obſerved, that it has always been held as the law of *Scotland*, that a prohibition to contract debt, without a clauſe irritating the contraveener's right, is not effectual, becauſe the law does not permit that a man ſhould retain the property of lands, and tranſmit them to his heir, without their being ſubject to the lawful debts by him contracted: and ſo it was judged by this Court 11th *March* 1707, heireſs of *Redheugh contra Forſyth*; and 27th *July* 1712, creditors of *Rickerton* competing. And where the heir is not laid under a reſtraint from ſelling, it is impoſſible to maintain, that the eſtate cannot forfeit by his attainder. E

"The Lords diſmiſſed the claim."

Act. *Ro. Craigie & Ferguſon.* Alt. *Advocatus,* Sol. *Haldane & And. Pringle.* Clerk *Gibſon.*

N° LXIV.

N° LXIV. 10th *February* 1753.

## *ELIZABETH FARQUHAR*

against

His MAJESTY's ADVOCATE.

*Elizabeth Farquhar* purchaſed the lands of *Pitſcandly*, and took the conveyance to herſelf in liferent; and, in caſe of her predeceaſe, to *James Stormonth* her huſband, in liferent, for his ſecurity and payment of an annuity of 500 merks, and to *Francis Stormonth*, their ſecond ſon, in fee.

*James Stormonth* was attainted of high-treaſon in the month of *January*, 1746-7, by judges appointed by commiſſion of oyer and terminer, and was afterwards pardoned under the condition of tranſportation for life. By an act paſſed in the ſeſſion of Parliament, then ſitting, it was enacted, That if any perſon to whom his Majeſty had, or ſhould thereafter grant his moſt gracious pardon, on condition of their being tranſported, ſhould return or come into any part of *Great Britain* or *Ireland*, he ſhould be guilty of felony, and ſuffer death without benefit of Clergy.

The lands of *Pitſcandly*, having been ſurveyed by the Barons of Exchequer, and *Elizabeth Farquhar* having entered a claim to the life-rent of theſe lands, provided to her by the conveyance above-mentioned, the queſtion came to be, Whether by the law of *England* the huſband's right, in conſequence of the marriage, to receive the profits of the lands liferented by his wife, accrues to the crown by forfeiture, when the huſband is attainted of high-treaſon, and thereafter pardoned, as to his life, with condition of being tranſported for life, and that tranſportation confirmed by act of Parliament?

*Pleaded* for the claimant: By the law of *England* the civil death of the huſband, to which the conſent of the wife was not neceſſary, was either by his abjuring the realm, on his confeſſion to the coroner of a crime of felony or murder for which he had taken ſanctuary; or by his being ſentenced to perpetual baniſhment, on a legal conviction; or upon his ſubmitting to baniſhment, in order to avoid a heavier ſentence: in all theſe caſes he was ſaid *perdere patriam*, and from that moment his wife was conſidered as *femme ſole*, qualified to ſue or to be ſued, and inveſted with every right in point of fortune, which would have been competent to her on the natural death of her huſband. For this there is an authority in point, in the caſe of *Margery de Moſe*, wife of *Thomas* of *Weiland*, 19. *Edw.* I. which caſe is fully narrated by Lord *Coke*, 1. *Inſt. fol.* 133. To apply theſe principles to the preſent caſe; by the conviction of *James Stormonth*, and by the condition under which he took his pardon, there is as effectual a baniſhment as could formerly have been eſtabliſhed by any abjuration before the coroner, and the act 20. *Georg.* II. *c.* 46, brings this baniſhment under the deſcription of a baniſhment by act of Parliament. The claimant is therefore to be conſidered as a *femme ſole*, is qualified to ſue and to be ſued as ſuch, and is intitled to enter into all thoſe rights, which would be competent to her, were her huſband naturally dead.

*Anſwered* for his Majeſty's Advocate: The forfeiture incurred by *James Stormonth*'s attainder for high treaſon, can no way be altered or affected by the ſubſequent conditional pardon, or act of Parliament relative thereto. This condition is not to be compared to baniſhment by ſentence, in caſes where by the old law ſuch a ſentence could be given, or to baniſhment by act of Parliament. In conſequence of ſuch a baniſhment, no forfeiture of real eſtates enſued; the land muſt be enjoyed by ſome body; and therefore it might be reaſonable to conſider the civil incapacity of the perſon baniſhed, as equivalent to natural death in reſpect of the wife.

" The Lords ſuſtained the claim of *Elizabeth Farquhar*, for her life-rent " of the lands mentioned in the claim, during all the days of her " life-time, for her own ſole uſe, and that as well during the natural " life of *James Stormonth* her huſband attainted, as after his deceaſe " before her, the ſaid *Elizabeth*. D

For the claimant, *Ferguſon*. Alt. *The Crown's Lawyers*.

N° LXV. 14th *February* 1753.

## EXECUTRIX of Dr. *MATHEW WRIGHT*

againſt

## *DAVID DICKSON.*

IN the year 1731, *Baillie* of *Walſton* was, by an inqueſt in *England*, found lunatic, and the cuſtody of his perſon was, by a grant under the Great Seal, committed to Dr. *Mathew Wright*.

The executrix of *Wright* purſued *Dickſon*, as repreſenting *Walſton*, for payment of certain ſums, ſaid to have been expended for the uſe of *Walſton* by *Wright*, as having the cuſtody of his perſon.

*Objected* by *Dickſon*, The ſtatute of limitation, 21. *Ja.* I. provides, " That " all actions of account, other than what concern merchandize between " merchant and merchant, ſhall be commenced within ſix years after the " cauſe of action, and not after." Now the accompt in queſtion does not concern merchandize between merchant and merchant; and although it commences in *October* 1731, yet was not purſued for until *October* 1738; and therefore as much of it as is not within ſix years of the date of the ſummons is by the law of *England* preſcribed, and cannot be the ground of action.

*Anſwered* for the purſuer, An accompt is a claim compoſed of different articles, and the preſcription of accompts has, with us, been found to run from the laſt article; were the preſcription to run from every ſingle article, every ſuch article would be an accompt by itſelf, which is contrary to the nature of an accompt as here deſcribed; and as the Court has ſo explained the preſcription of accompts in our law, ſo alſo ought the preſcription provided in the ſtatute of limitation to be underſtood.

" The Lords found, That, by the ſtatute of limitation, the accompt " purſued on, preſcribed only from the laſt article thereof." D

Act. *R. Dundas & Haldane*. Alt. *Mackintoſh*. Clerk *Juſtice*.

N° LXVI.

N° LXVI. 15th *February* 1753.

*PATRICK HALDANE* of *Bearcroſs*, Eſq; One of His MAJESTY'S SOLICITORS,

againſt

*ARCHIBALD* DUKE of *DOUGLAS.*

THE Duke of *Douglas*, in 1718, granted bond to his ſiſter Lady *Jean Douglas* for the ſum of 30,000 merks *Scots*, bearing annualrent, but containing a power to his Grace to revoke the ſame at pleaſure.

Afterwards, in 1736, the Duke granted to Lady *Jean* a bond of annuity, narrating, that, by bonds of proviſion, granted either by the deceas'd *James* Marquis of *Douglas*, or by himſelf, ſhe ſtood provided in the ſum of 50,000 merks; and that the yearly annualrent of the ſaid ſum, being 138 *l.* 17 *s.* 9⅓ *d. Sterling*, was not a ſufficient fund for ſupporting her conform to her degree and quality; and therefore, as a teſtimony of his brotherly love and affection to the ſaid Lady *Jean*, he ſettles upon her, *during his pleaſure allenarly*, an additional ſum of 161 *l.* 2 *s.* 2⅔ *d. Sterling*, to be paid quarterly.

The Duke paid theſe annualrents and additional annuities regularly, till *Whitſunday* 1749. But, in *July* ſaid year, he wrote a letter to Mr. *Archibald Stewart* his doer, diſcharging him to make any further payments to Lady *Jean*; of which letter Mr. *Stewart* acquainted Lady *Jean*; and, on the 2d of *June* 1752, the Duke executed a formal revocation of the bond for 30,000 merks, and of the bond of annuity.

Lady *Jean Douglas* being debtor to Mr. *Patrick Haldane* by bond, dated 23d *May* 1743, he uſed arreſtment in the Duke's hands of all ſums of money due by his Grace to Lady *Jean*, and brought an action of forthcoming; and, amongſt other things, inſiſted againſt the Duke for the annualrents of the 30,000 merks, and for the additional annuity ſince *Whitſunday* 1749.

*Pleaded* for the Duke, That theſe ſums were only payable during pleaſure; and therefore neither Lady *Jean* nor her creditors can demand them from the Duke: it was not neceſſary to make any intimation to Lady *Jean*, that he was not to continue the favour; it being a good anſwer to any demand for theſe ſums from the Duke, to ſay, that he did not pleaſe to pay them any longer: but if any ſuch intimation was neceſſary, it was ſufficiently made by his Grace's letter to Mr. *Stewart* in *July* 1749, with which Lady *Jean* was acquainted before *Lammas* that year.

*Anſwered* for Mr. *Haldane*, That the annualrents and annuities continued to be due till formally revoked in *June* 1752; for, till that time, neither Lady *Jean*, nor her creditors, could know that his Grace was to withdraw his bounty; and, till ſhe knew it, ſhe was intitled to live up to the yearly income ſettled on her by her brother, and creditors to contract with her on the faith of it. An obligation, *ſi voluero dare ſpondeo*, is abſurd; but one may bind himſelf to pay a yearly ſum revocable at pleaſure; and ſuch ſum will continue to fall due till actually revoked. The letter to Mr. *Stewart* is not equal to a revocation; for tho' Mr. *Stewart* was thereby diſcharged to pay, yet the Duke, or ſome of his factors, might have paid the annualrents and annuities; at leaſt, there can be no doubt that the annualrents of the 30,000 merks continued to become due, till the bond was revoked.

" The

" The Lords found, That the additional annuities and annualrents of " the 30,000 merks were due till actual revocation; and that the ad- " ditional annuities were actually revoked by the Duke's letter to Mr. " *Stewart*, dated 10th *July* 1749, and notified to Lady *Jean* before " *Lammas* 1749, and therefore were only due to *Whitsunday* 1749; " but found, That the annualrents of the bond for 30,000 merks were " due till the date of the revocation of the said bond in *June* 1752."

B

Act. *Advocatus, Haldane & Hay.* Alt. *Ro. Craigie & And. Pringle.* Reporter, Lord *Dun.* Clerk *Kirkpatrick.*

N° LXVII. 20th *February* 1753.

## *JOHN FRENCH*

against

## *JOHN BRUCE.*

*John French*, Procurator-fiscal of the sheriff-court of *Aberdeen*, exhibited a complaint to the Sheriff-depute, against *John Bruce*, for having acted as Baron-bailie to *Leslie* of *Coburty*, without having taken the oaths to the government, and registred a certificate thereof as directed by 20th *Geo.* II. *cap.* 43. concluding for the penalty of 10 *l.*

*Bruce answered:* He had been formerly appointed Baron-bailie to another gentleman, and as such had taken the oaths, and registred a certificate therof, in the Sheriff-court books of the same county of *Aberdeen*, where he did then, and does now reside; and therefore *pleaded*, he was not liable to the penalty; for that the statute does not require persons to take the oaths and register a certificate thereof, each time they are appointed Baron-bailies. The Sheriff decreed the penalty of 10 *l.*

*Bruce* raised letters of suspension, and *pleaded* as above.

*French insisted*, That, by the words of the statute, the legislature meant to put Baron-bailies upon the same footing, as to taking the oaths, with other judges. A Sheriff-depute or Justice of peace, tho' qualified for one county, must, upon being appointed for another county, take the oaths a second time. Baron-bailies ought therefore to do the like.

The Lords were of opinion, that the statute being a penal law the words of it ought not to be extended.

" They suspended the letters *simpliciter*."

S

Act. *Ja. Montgomery.* Alt. *Lockhart.* Clerk *Justice.*

N° LXVIII. 21st *February* 1753.

## COLONEL *ABERCROMBIE*

against

## *WILLIAM LESLIE* of *MELROSS.*

BY a *Michaelmas* meeting of the freeholders of the county of *Bamff*, the defender was inrolled in the roll of electors for that county.

The

The purſuer, one of the freeholders, complained; and objected, That the freeholders had inrolled the defender without legal evidence of his valued rent; for that the diviſion of the valued rent of certain parcels of his lands from that of ſome lands belonging to another freeholder, had not been made by a legal meeting of the commiſſioners of ſupply, but only by a private meeting of four commiſſioners, not ſummoned in terms of law. At adviſing this cauſe, tho' no iniquity was alledged in the diviſion of the valuation made by the commiſſioners, yet the Court was very clear, that, by the act of the convention of the eſtates 1687, the act 1690, *William* and *Mary*, *ſeſſ.* 2. *cap.* 6. and the other acts touching the ſupply, the meetings of the commiſſioners muſt be either upon the day mentioned in the act of Parliament, or by adjournment, or when ſummoned by the conveener. Now, as the meeting of the commiſſioners was not ſummoned in any of theſe ways, it muſt be illegal; for, when law appoints how a meeting is to be called, it muſt be called in that way, elſe it is not a legal meeting, and its acts are void.

" The Lords found the valuation not divided in terms of law; and or-
" dained *William Leſlie* to be expunged from the roll of freeholders."

S

Act. *A. Lockhart & R. Craigie.* Alt. *J. Ferguſon & Advocatus.* Clerk *Kirkpatrick.*

N° LXIX. 28th *February* 1753.

The EARL of *MORTON*, and CAPTAIN *STEWART* of *Dunearne*,

againſt

The OFFICERS of STATE, and the MARQUIS of *Tweeddale.*

THE purſuers, as heritors of certain lands, having brought a proceſs for valuation and ſale of their teinds, inſiſted for approbation of two reports, made by the ſub-commiſſioners in the year 1629 and 1630; by which reports, the ſtock and teind of their reſpective lands are declared to be worth, yearly, certain ſpecies therein particularly mentioned.

The Crown as titular, and the Marquis of *Tweedale* as tackſman, defenders, without objecting to theſe reports, either in point of form or of matter, ſet forth: That, as they had been obtained at the ſuit of the procurator-fiſcal appointed by the ſub-commiſſioners, without the privity of parties, ſo parties had never regarded them; for, that the titular or his tackſman had let, and the heritors had received tacks of the teinds for payment of certain duties, which, tho' not of greater value than thoſe in the reports, yet conſiſted of different ſpecies.

Upon this, they objected to the approbation of the reports, that they had not only been diſregarded, but deſerted from the beginning; ſo that, beſides the mere negative preſcription, here was alſo immemorial contrary uſage founded upon conſent of parties; and that therefore there muſt be a new valuation of the lands, according to their preſent rent.

 *Anſwered*

*Anſwered* for the purſuers: That the negative preſcription always ſuppoſes a right eſtabliſhed which may be loſt *non utendo*; but the reports of ſub-commiſſioners did not eſtabliſh any right whatſoever: they did not give the heritor a right to lead his own teinds; for that was only to be obtained by a ſpecial warrant from the Lords Commiſſioners, upon a depending proceſs of valuation, as appears by act 1693. *Will.* and *Mar. cap.* 23; neither did ſuch reports, during the dependence of the proceſs, ſo much as aſcertain the titular's claim upon the heritor; but, like a prepared ſtate of a proof, they had no legal effect whatſoever, till the Lords Commiſſioners gave judgment upon them. In ſhort, they are nothing more than the evidence of a fact, which loſeth not its force by lapſe of time. And it is upon this principle, ſurely, that, by the later practice of the court, the mere negative preſcription is held, not to bar the reports of ſub-commiſſioners. Such being the caſe, it does not occur, why contrary uſage ſhould have any effect in the matter; ſeeing contrary uſage muſt always preſuppoſe a right to which the uſage is contrary. And herein lies the great difference between the reports of ſub-commiſſioners and the judgments of the Lord-commiſſioners: the latter gave a right, which was a ſubject of preſcription; the former gave no ſuch right.

2*do*, Suppoſing ſome ſort of right, eſtabliſhed by the reports, yet a variation of the ſpecies, if within the value of the reports, which is the caſe here, will not infer a deſertion of the right. See the caſe of the Viſcount of *Stormonth* againſt *Hunter*, 10th *June* 1630.

*Replied* for the defenders: That, tho', by the later practice of the court, the reports of ſub-commiſſioners have been found not to be loſt by the mere negative preſcription; yet that was no argument why they might not be paſſed from, and entirely rejected, by contrary uſage and poſſeſſion. It is abſurd to ſay, that proceedings of ſub-commiſſioners had no effects which might be the ſubject of preſcription; for this were to give them ſtronger effects than the proceedings of their conſtituents. It is certain, that, upon raiſing a proceſs of valuation, the heritor gets right to draw his own teinds during the dependence, and the decree is drawn back to the date of the action, and makes the heritor liable, from that time, for the valued teind. This hath always been held to be the interpretation of the act 1633, *Ch.* I. *cap.* 17. and of the after acts. By the act 1693, a proteſtation, at the titular's inſtance, puts an end to the heritor's right of leading his own teinds, and to the whole proofs and other proceedings in the proceſs of valuation: if ſo, an agreement between the titular and heritor, during the dependence, for the titular's poſſeſſing according to a rental entirely different from the reports, and poſſeſſion upon that agreement, for more than 40 years, ſhould much more put an end to the whole proceſs of valuation, and, by conſequence, to the reports which are a part of that proceſs. Taking the argument upon this footing, it makes no difference, that the quantities, paid upon the tacks, was of no greater value than thoſe in the reports.

" The Lords found the ſubvaluations libelled on derelinquiſhed, and
" quite innovated, by conſent of parties, in the ſub-tacks produced;
" and that theſe cannot now be approven: and therefore aſſoilzie
" the defenders from the approbation."

In a reclaiming bill againſt this interlocutor, after inſiſting upon the ſame topics as above, in ſupport of the ſubvaluations, the purſuers ſet forth, that

that they had lately diſcovered in the records, that the preſent rental bolls, or rents, had been payable, for the teinds in queſtion, long before the reports were made by the ſub-commiſſioners; and thereupon they urged a new and alternative argument which would be ſtill more beneficial to them: *viz.* That, if the ſubvaluations were not to be the rule, the reaſon ought not to be becauſe they were innovated or derelinquiſhed, but becauſe they were erroneous *ab origine*; for that the ſub-commiſſioners ought not to have taken a proof of the value of the ſtock and teind jointly, but ought to have reported the old rentals, which, after deduction of one fifth, called the *King's eaſe*, ſhould be found to be the value of the teind. That this is the rule laid down by the act 1633, *Ch.* I. cap. 17; and Lord *Stair* ſo explains that act, in *lib.* 2. *tit.* 8. *Parl.* 14. And his Lordſhip is followed by the later writers. *See* the caſe of *Robertſon* of *Bedlay*, againſt the college of *Glaſgow* in 1734.

*Anſwered* for the defenders: That the juſt interpretation of the act 1633 is, That where the teinds are let to the heritor, and not drawn by the titular or his tackſman, ſo that they are not known ſeparately from the ſtock; then the fifth part of the rent of ſtock and teind jointly, is the rule for valuing the teinds: but where the teinds are drawn by the titular or his tackſman, and ſo are known apart and ſeparately from the ſtock; then the worth of the teind alone muſt be proved, and that worth, after deduction of one fifth, is the rule. The preſent caſe is the object of the firſt rule; for the teinds in queſtion are let to the heritors and not drawn. But rental bolls, or rents for teinds, were never conſidered, by the court, as the rule for valuations; far leſs, were they ſo, with deduction of a fifth part. In the caſe of the college of *Glaſgow*, this conſtruction was never argued or pretended: the ſingle queſtion was, Whether it would be a dilapidation in the college, to conſent that the teinds ſhould be valued at the rental bolls which were admitted to be under a fifth part of the rent of ſtock and teind; and the Lords found that the college might conſent. Lord *Stair*, in the place above mentioned, expreſſes himſelf very unaccurately; and the other authors only copy after him: but his Lordſhip, in effect, retracts that doctrine in parag. 24. of the ſame title, where he ſhows, that a rental proves the value of the teinds no longer than while parties acquieſce therein: and it is fixed by variety of deciſions, that the payment of rental bolls may, at any time be determined, by inhibition uſed upon the part of the titular, or by intimation upon the part of the heritor. See the caſes of *Lenox* againſt *Tennents*, 22d *March* 1626; Lord *Blantyre* againſt the pariſhioners of *Bothwel*, 18th *March* 1628; and the college of *Glaſgow* againſt *Stewart*, 20th *February* 1633.

To ſhew that it was not the ſenſe of the law, that rentals ſhould be the rule of valuations, it was mentioned on the bench, that, on the 28th *February* 1628, the Commiſſioners ratified a letter from the King, declaring old rentals to ſtand for a valuation, only where the parties conſent, or do not oppoſe it. See *Forbes*, *cap.* 9. § 3. pag. 399.

" The Lords having conſidered the bill, and anſwers, adhered; and " refuſed the deſire of the petition." s

Act. *A. Boſwel.* Alt. *R. Craigie.*

N° LXX.

N° LXX. 2d *March* 1753.

His MAJESTY's ADVOCATE and Mr. *JAMES CARMICHAEL*

againſt

The Reverend Mr. *ROBERT DICK.*

THE pariſh of *Lanerk* having become vacant in the month of *Auguſt* 1748, Mr. *Lockhart* of *Lee*, as ſtanding infeft in the patronage, under a charter from the Crown, *anno* 1647, preſented Mr. *Robert Dick* to the vacant pariſh; and which preſentation was duly accepted and given in to the Preſbytery, in the month of *October* 1748.

Some time after, and within the ſix months, another preſentation was given in to the Preſbytery, by the Crown, as patron of the ſaid pariſh, in favours of Mr. *James Gray*. The Preſbytery, for ſome time, delayed giving their judgment; and, at laſt, upon the 11th *April* 1750, they preferred Mr. *Lockhart's* preſentee, and appointed a moderation of a call in his favours, and which call they afterwards ſuſtained.

The Magiſtrates of *Lanerk* having appealed to the General Aſſembly which met in the month of *May* 1750, the Aſſembly affirmed the ſentenee of the Preſbytery, and appointed them to proceed to the ſettlement of Mr. *Dick*.

In obedience to this judgmcnt, the Preſbytery proceeded to the trial of the ſaid preſentee; but, being interrupted in their procedure by a mob in the town of *Lanerk*, the matter was referred to the Synod, who appointed Mr. *Dick* to be ordained at *Glaſgow*. This was accordingly done upon the 4th *October* 1750; and, in conſequence thereof, Mr. *Dick* obtained poſſeſſion of the church, and has ſerved the cure as Miniſter of the pariſh ever ſince.

During theſe proceedings before the eccleſiaſtic courts, Mr. *Lockhart*, in the month of *March* 1750, raiſed a declarator of his right of patronage before the Lords of Seſſion; and, upon the 10th *June* 1751, the court adjudged, " That Mr. *Lockhart* had produced no ſufficient title to the pa-
" tronage in queſtion; and that, for ought yet ſeen, the ſaid patronage
" remains with the Crown; and decerned and declared accordingly."

Soon after this judgment, the Barons of Exchequer granted a factory to Mr. *James Carmichael*, for his Majeſty's behoof, to uplift the vacant ſtipend of this pariſh: and a multiple-poinding having been brought in name of the heritors, a competition enſued between the King's factor and Mr. *Dick* the Miniſter, for the ſtipends which had fallen due ſince the time of Mr. *Dick*'s admiſſion.

*Pleaded* for the factor, That, by the act 114. Parl. 1592, " it is ordain-
" ed, that all preſentations to benefices be directed to the particular Pre-
" ſbyteries in all time coming, with full power to them, to give col-
" lation thereupon, providing the foreſaid Preſbyteries be bound and a-
" ſtricted to receive and admit whatſoever qualified Miniſter, preſented
" by his Majeſty or laick patrons." And by the immediate following act of the ſame Parliament, it is further provided, " That, in caſe the
" Preſbytery refuſes to admit any qualified Miniſter preſented to them
" by the patron, it ſhall be lawful to the patron to retain the whole
" fruits of the ſaid benefice in his own hands."

Theſe

Theſe ſtatutes, tho' ſuſpended during the ſubſiſtance of the act 1690, which aboliſhed the right of preſentation, again revived when patronages were reſtored; and are admitted, ſince that time, to be part of the law of *Scotland*. Without ſome ſuch conſtitution, the right of preſenting would be inept. The compulſitors of the law, which formerly took place for enforcing preſentations, were not thought ſo well accommodated to the genius of Preſbytery; and therefore a more gentle remedy was deviſed by theſe ſtatutes, *viz.* That the benefice ſhould remain with the patron as vacant, till the Preſbytery admit his preſentee; and which indeed is ſaying no more than what is implied in the nature of his right and *inerat de jure*, without ſuch expreſs proviſion. And accordingly, this Court has applied this remedy of the law, in two former inſtances; in the caſe of the patron of *Auchtermuchty*, *anno* 1735; and lately, in that of *Charles Cochran* of *Culroſs*, againſt *Stoddard*, *anno* 1751.

And as the King, by the judgment of this court above recited, has been found to be lawful patron of this pariſh; and in due time, after the death of the laſt incumbent, preſented to the Preſbytery, Mr. *James Gray*, *a well-qualified perſon*, to ſupply the vacancy; and that the Preſbytery have, to this day, *refuſed* or deferred to admit the ſaid preſentee; therefore, in terms of the ſtatutes above quoted, his Majeſty is entitled to *retain* the whole fruits of the benefice in his own hands, until his preſentee ſhall be admitted; and the factor, appointed by the Barons of exchequer for receiving ſuch fruits, ought to be preferred thereto accordingly.

*Anſwered* for Mr. *Dick:* The ſanction of the act 1592, can only apply to the patron in poſſeſſion of the vacant benefice, at the time when he preſents to the Preſbytery; for, a poſſeſſion of the benefice cannot be *retained*, till it is *attained*. Mr. *Lockhart* and his predeceſſors have ſtood infeft in this patronage ſince the 1647: it is not pretended that the Crown has exerciſed one act of poſſeſſion ſince that time; and it is proved, that, upon occaſion of the laſt vacancy of the pariſh, in the year 1708, Mr. *Lockhart*'s predeceſſor diſpoſed of the vacant ſtipend, as patron; ſo that Mr. *Lockhart* muſt be conſidered as the patron in poſſeſſion. If Mr. *Lockhart*'s preſentee had been rejected by the Preſbytery, it was indeed poſſible for him to have *retained* the vacant ſtipend, of which he had the laſt poſſeſſion; but it is impoſſible for the King to have the benefit of the ſanction of this law, by *retaining* what he never poſſeſſed.

2*do* & *ſeparatim*, Every perſon, in poſſeſſion of any ſubject or right, by virtue of a habile title, is entitled to retain and enjoy that poſſeſſion till ſuch time as he is legally diſpoſſeſſed by the true proprietor. The right of preſenting is a proper fruit of patronage; and conſequently, a party in poſſeſſion of a patronage, in virtue of a habile title, is entitled to preſent; and his preſentation will be effectual, altho', before collation, his right be brought under challenge: *Lambertinus de jure patronatus*, *lib.* 2. *part.* 1. *queſt.* 3. *art.* 4. *Jacob's law dict. Darreign preſentment. Reg. mag. lib.* 3. *cap.* 33. From theſe principles it follows, that Mr. *Lockhart*'s preſentation having been granted before any challenge againſt his right, was a good preſentation; and, having had effect by the ordination of the preſentee, cannot be rendered invalid by the after decreet of the civil court ſetting aſide his right.

3*tio*, The ſanction of the ſtatutes above-quoted, cannot apply to the preſent caſe; becauſe the Preſbytery complied with the direction of the

law; and admitted the preſentee of the only legal patron, ſo far as could appear to them. The law indeed requires, that the Preſbytery ſhould admit the perſon preſented by the patron: but, as it has given the Preſbytery no remedy, whereby they can bring the rights of competing patrons to trial in the civil court; it muſt therefore be implied, in the juriſdiction given them by law of admitting the preſentee of the lawful patron, that they muſt have a power of trying the rights of competing patrons, to the effect of explicating that juriſdiction. And this judgment of the Preſbytery, upon the point of civil right, muſt determine the ſettlement of the church, and put an end to the vacancy; and conſequently, to any claim for the benefice as vacant, *pro hac vice*. It will not indeed preclude the party aggrieved, from having his right afterwards tried in the civil court; but ſtill it muſt determine the right to the effect of ſupplying the preſent vacancy: and, if it were otherways, this abſurdity would follow, that, tho' the law has required the Preſbytery to ſettle vacant churches, upon the preſentation of the lawful patrons; yet the Preſbytery cannot comply with the law, where-ever a competition happens about the patronage. Neither the Preſbytery, nor the civil Judges, can force the parties to a deciſion of their rights; and ſo, by this means, vacancies may be continued for ever. And, as to the caſes of *Auchtermuchty* and *Culroſs*, they are, in many reſpects, different from the preſent; and conſequently, the deciſions therein given will not apply.

In the reply for the factor, it was obſerved, that Mr. *Lockhart* never had been in the proper poſſeſſion of this patronage. The King himſelf had preſented the laſt time it could be done, in the 1643: and the pretence of Mr. *Lockhart*'s poſſeſſion in the 1708 is frivolous; for it appears that *Lockhart* of *Carnwath*, and the town of *Lanerk*, took upon them alſo to grant aſſignations of the vacant ſtipend of that year, under the aſſumed character of patrons; and ſuch private grants, without the knowledge of the King's officers, could not be ſufficient to diſpoſſeſs his Majeſty of this patronage.

" The Lords preferred Mr. *Robert Dick*, the incumbent, to the ſti-
" pend that hath fallen due, ſince his admiſſion to be Miniſter of
" the pariſh of *Lanerk*, and in time coming, during his incum-
" bency; and decerned accordingly." *Reversed.* M

Act. *Advocatus & Pringle.* Alt. *Dick, Brown, & Pringle.* Clerk *Kirkpatrick.*

N° LXXI. 3d *March* 1753.

CAPTAIN *JOHN SCOTT* and others, Complainers

againſt

CAPTAIN *JOHN SUTHERLAND* of *Forſe*, Reſpondent.

CAptain *Scott* purchaſed the ſuperiority of part of the eſtate of *Hempriggs*, lying in the county of *Caithneſs*, which eſtate ſtood valued *in cumulo*, in the ceſs-books of the ſhire, at *L.* 3,600.

Captain *Scott* made over part of his purchaſe to Sir *Robert Gordon*, and Mr. *Hay* of *Leys*; and, in *July* 1750, theſe three Gentlemen obtained

tained charters, under the great ſeal, of their reſpective lands; and were duly infeft.

Thereafter, they applied to a general meeting of the Commiſſioners of ſupply, to have the valued rent of their reſpective lands aſcertained; which accordingly was done, by proportioning the total valuation of the eſtate of *Hempriggs*, to the preſent real rent thereof, and of the ſeveral parcels belonging to the complainers; whereby it appeared, that the valued rent of the part belonging to each of them exceeded *L.* 400: and, by order of the Commiſſioners, this diviſion was entered in the valuation-books of the ſhire; and the ceſs directed to be uplifted accordingly.

Theſe Gentlemen ſeverally entered their claims before *Michaelmas* 1751, to be inrolled in the roll of electors, for the ſaid county, in terms of the ſtatute of the 16th of his preſent Majeſty; and produced their infeftments, with the evidence of the diviſion of the valued rent, to the meeting of the freeholders: but Captain *John Sutherland* of *Forſe*, and a majority of the meeting, refuſed to inroll them.

A complaint was thereupon exhibited before the Court of Seſſion, againſt Captain *Sutherland*; who, in anſwer thereto, repeated the objections upon which the inrollment had been refuſed by the freeholders: particularly,

*Objected:* That there was no proper evidence, that the lands, in which any of the complainers was infeft, amounted to *L.* 400 of valued rent; for that the total valuation of the eſtate of *Hempriggs*, extending to *L.* 3,600, aroſe from the joint value of *ſtock* and *teind*; conſequently, the ſeveral proportions thereof, at which the complainers lands had been rated, muſt alſo be for both *ſtock* and *teind*: but the fact is, that the complainers have no right to the ſuperiority of the teinds of their ſeveral lands. Their laſt charters indeed comprehend the *teinds* as well as the *lands:* but this muſt have happened by miſtake; as the deeds of conveyance in their favour, did not diſpone, nor contain any warrant for reſigning, the *teinds*. And it appeared that their authors had no other right to the teinds, but by ſubtacks, flowing from the Biſhop of *Caithneſs*. And, after deducing a fifth part from the valuation of each of their lands to anſwer for the teinds, it appears that none of them will have the legal qualification of being publicly infeft in lands holden of the Crown, of *L.* 400 of valued rent.

And, in order to prove that the teinds were included in the total valuation of the eſtate of *Hempriggs*, the acts of convention 1643, and 1649, were referred to; which ordain, that every perſon's rent ſhould be valued in *ſtock*, as well as in *teind*, with deduction of the burdens affecting the ſame; and which method was accordingly followed by the Commiſſioners for valuing the ſeveral counties of the kingdom: as appears from ſome of the original valuation-books ſtill extant; and particularly in the re-valuation of this county of *Caithneſs*, in purſuance of an act of Parliament in 1701, the directions of the above acts of convention appear to have been followed; for, where the teind was ſeparately poſſeſſed, it was ſeparately valued from the ſtock; but, where the heritor was in poſſeſſion both of ſtock and teind, which was the caſe in the eſtate of *Hempriggs*, no diſtinction was made; but the valuation was aſcertained according to the total rent of the land in *ſtock* and *teind*, after deducing the teind-tack duty payable to the titular, and other burdens affecting the ſame; ſo that the valuation of this eſtate appears to have been both for

*ſtock*

*ſtock* and *teind*, tho' the heritor had no right of property in the teinds, but poſſeſſed them by a ſubtack from the Biſhop.

And, as ſuch ſubtack is not a title of freehold by the law of *Scotland*, conſequently the valued rent of the teinds of the complainers ſeveral lands poſſeſſed under that title, cannot enter *in computo*, to make up the *L.* 400 valuation, required by the act 1681. Had the teinds been ſeparately valued, the complainers would have had no pretence to a vote: and their having been jointly valued with the ſtock, cannot make their right better, when it appears, that part of that joint valuation belonged to the teinds.

*Anſwered* for Captain *Scott* and the other complainers: 1*mo*, Their infeftments, produced before the freeholders, contain the teinds as well as the lands: and the freeholders have no juriſdiction by law, to call for, or cognoſce upon, the warrants of any infeftment; and, if this is ſo, neither has the Court of Seſſion juriſdiction, in this ſtate of the caſe, to judge of the above objections to the complainers titles. Theſe may be the ground of a reduction before their Lordſhips, in another capacity, at the inſtance of any party having intereſt; but, upon the preſent complaint, their Lordſhips can only judge as a court of appeal; and pronounce ſuch judgment as the freeholders, according to the powers committed to them, ought to have pronounced.

2*do et ſeparatim*, Whatever way the right of the teinds may ſtand, the complainers were entitled to have been inrolled by the freeholders; as it ſtill remained true, that, in terms of the ſtatutes 1681, and 16th of his preſent Majeſty, they ſtood infeft in the ſuperiority of lands holden of the King, "liable in public burden for his Majeſty's ſupplies for *L.* 400 "of valued rent." And theſe ſtatutes do not diſtinguiſh, whether ſuch valued rent of the lands ariſes from *ſtock* or *teind*, or both; or, whether the proprietor or ſuperior of ſuch lands, hath an heritable right to the teinds of the lands, or not. The law requires, that the party claiming a vote, be proprietor or ſuperior of lands of *L.* 400 valued rent, and requires no more; and this hath been conſtantly held to be law, ſince the ſtatute 1681, over the whole nation, But, according to the reſpondents new doctrine, the proprietor or ſuperior muſt either produce an heritable right to his teinds, or he muſt be proprietor or ſuperior of lands of *L.* 500 valued rent. It is impoſſible to foreſee, what confuſion and dangerous conſequences this doctrine might introduce into the conſtitution of the kingdom; it ſeems plainly to import a repeal of all the ſtatutes made with reſpect to the qualifications of electors; particularly the aforeſaid ſtatute of the 16th of his preſent Majeſty, which declares, "That lands "holden of the King or Prince, liable in public burdens for *L.* 400 *Scots*, "valued rent, ſhall, in all caſes, be a ſufficient qualification of a free-"holder."

And, with reſpect to the acts of convention 1643 and 1649, which the reſpondent ſets forth as the foundation of the *valued rent* of *Scotland*, the complainers differ from him in point of fact; for it appears from hiſtory, that the united Parliament of *Great Britain* and *Ireland*, held in the 1656, during the protectorate of *Oliver Cromwell*, impoſed a land-tax upon the three kingdoms, amounting, in *Scotland*, to *L.* 6000 *Sterling per* month, the ſame land-tax that continues to be levied in *Scotland* at this day: and, as this was different from the land-tax, levied purſuant to the acts 1643 and 1649, by the name of *monthly maintenance*, which

which amounted to *L.* 9000 *Sterling* monthly, and upwards; ſo it appears that it was uplifted by another valuation, made at that time, which was conſiderably leſs than that of the 1643, and 1649; and which laſt valuation, taken up in the 1656, is certainly what is referred to in the act of convention 1667, and in the ſubſequent ceſs acts, both before and ſince the union of the two kingdoms; ſo that the reſpondent's whole argument, built upon the acts of convention 1643, and 1649, and the valuation proceeding thereupon, entirely falls to the ground, as the land-tax of *Scotland* is now paid, and the qualifications of electors regulated, not by the valued rent taken up in purſuance of the acts of convention, but according to the after-valuation in the 1656.

The Lords, in their reaſoning, ſeemed to be chiefly moved by the ſecond anſwer for the complainers, founded upon the words of the ſtatute 1681; and

" Found that the petitioners, in virtue of their titles produced before " the freeholders of *Caithneſs*, were ſufficiently intitled to have been " inrolled in the roll of electors of a member of Parliament for " the ſaid ſhire; and that the objections to their titles were not re- " levant; and that the freeholders did wrong in refuſing to inroll " the petitioners: and therefore ordained them to be added to the " ſaid roll, and decerned and declared accordingly." M

Act. *R. Craigie & R. Dundas.* Alt. *Ja. Ferguſon & Alex. Boſwel.* Clerk *Pringle.*

N° LXXII. 6th *March* 1753.

## *WILLIAM BARRON*

againſt

## *THOMAS DUNCAN.*

*Barron* granted a ſubſet of certain lands to *Duncan* for five years; the agreement was executed by mutual miſſive-letters betwixt them, which were written by a third party; and *Duncan* entered into the poſſeſſion of the lands, and poſſeſſed the ſame for one year.

*Barron* obtained a decreet of removing, againſt him, before the Sheriff, upon which he was ejected.

In a reduction of this decreet, *Barron* acknowledged his ſubſcription to the letter; but pleaded, that ſuch miſſive-letter, not being holograph, is not a proper writing for conſtituting a tack for a number of years.

*Anſwered:* Whatever might be the caſe, in a queſtion with ſingular ſucceſſors, this plea cannot be good to the defender, who acknowledges the contract, and his ſubſcription to the writing, eſpecially after it has taken effect by poſſeſſion.

" The Lords ſuſtained the reaſons of reduction, and ordained the pur- " ſuer to be repoſſeſſed." M

Act. *J. Burnet.* Alt. *And. Pringle.* Clerk *Kirkpatrick.*

N° LXXIII. 7th *March* 1753.

Mrs. *ISOBELL DOUGLAS* of *Kirkneſs*, Supplicant

IN the proceſs betwixt Mrs. *Iſobell Douglas* and *William Douglas* concerning the eſtate of *Kirkneſs*, decided as marked 3d *February* laſt, Mrs. *Iſobell Douglas* gave in a petition to the Lords, ſetting forth, That *William Douglas* had appealed the cauſe to the houſe of Peers; and, as the cauſe had been more fully, and ſomewhat differently ſtated in the informations than in the minutes of debate before the Lord Ordinary, craved that the Lords would ordain the informations to be ingroſſed in the decreet.

*William Douglas* appeared and objected, That the informations were no part of the proceſs; and therefore could not enter the record: and tho' ſometimes of conſent they had been ingroſſed in decreets, or, after a hearing in preſence, have been inſert in place of inner houſe minutes; yet, in this caſe, they could not be taken into the decreet, as there had been no hearing: and he would not conſent to the extracts being ſwelled by informations; which would occaſion an additional and unneceſſary expence.

Obſerved on the bench: That it was reaſonable that whatever had been before the Court, ſhould be ingroſſed in the decreet; and, not only the parties, but alſo the Court, had an intereſt that it ſhould be ſo; in order that the houſe of Peers might know on what the judgment of the Court of Seſſion had proceeded.

" The Lords ordained the informations to be ingroſſed in the extracts " of the decreet." B

For the petitioner, *And. Pringle & Bruce.* Alt. *A. Lockhart & R. Dundas.* Clerk *Gibſon.*

N° LXXIV. 10th *March* 1753.

PROVOST *JOHN BUCKNAY*, BAILIE *THOMAS SMITH* and others,

againſt

*JOHN FERRIER.*

THE town-council of *Linlithgow* having elected *John Ferrier* to be one of the Guild-counſellors, Provoſt *Bucknay* and others ſuſpended, and brought a reduction of the election, ſetting forth, That, by a ſentence of the Court of Seſſion, *John Ferrier* had been found guilty of an illegal extortion of a ſum of money, while he acted as a Judge; and therefore declared incapable to exerce the office of a judge in all time coming: and they *inſiſted*, That he was thereby diſabled from being elected a counſellor; 1*ſt*, Becauſe a counſellor may, in ſome ſenſe, be called a *judge*, as he is intruſted with the adminiſtration of the burgh; and muſt give his opinion, with regard to the direction of the public affairs thereof. 2*dly*, Becauſe, by the ſet of this Burgh, the Provoſt and four Bailies, who are judges in the ſtricteſt ſenſe, are choſen out of nineteen Guild-counſellors; as therefore theſe counſellors are the great leet, out of which the Provoſt and Bailies are elected, none can be a counſellor but who is capable of being elected into theſe offices. If one incapable may be

be choſen a counſellor, ſo may all the nineteen; and then how could the election of the Provoſt and Bailies proceed?

*Anſwered* for *John Ferrier:* That penal ſentences are never to be extended; he was only found incapable of being a judge, but is as capable of any other office as ever. Had he been declared incapable of public truſt, there would be ſome foundation for the ſuſpenders argument; but a counſellor is not a judge: and, though the Provoſt and Bailies are elected out of the Guild-counſellors, it does not from thence follow, that none can be a counſellor, but who may alſo be a Provoſt or Bailie, for theſe may be choſen out of the remaining counſellors; and, according to the ſuſpenders argument, Mr. *Ferrier* could not be a burgeſs, becauſe the Magiſtrates are choſen out of the burgeſſes; but, as it muſt be admitted that he remains a burgeſs, ſo he alſo may be a counſellor.

" The Lords repelled the reaſons of ſuſpenſion; and aſſoilzied from " the reduction."

B

Act. *R. Dundas & R. Bruce.* Alt. *Williamſon, & Jo Grant.* Reporter Lord *Elchies.* Clerk *Gibſon.*

N° LXXV. *March* 11th 1753.

## *ALEXANDER DURY* and *DAVID DOIG,*

against

## *JOHN DURY.*

*Doig*, as truſtee for *Alexander Dury*, having brought a proceſs for adjudging the lands of *Dury-hill*; *John Dury* produced, as a preferable right, a diſpoſition of theſe lands by *Alexander*, in his favour.

From inſpection of this deed, it appeared, That, at the time of its being ſubſcribed, neither the date, nor the names and deſignations of the witneſſes, were inſerted: and, that there was not ſufficient ſpace left for the purpoſe; the diſponer having ſet his name too near the words, with which the deed, as it ſtood at that time, ended: that, in order to remedy this defect, ſome words, which had been in the deed when ſubſcribed, were afterwards eraſed; and that the writer of the deed had re-placed them in a cloſer hand, and crowded in the date above the ſubſcription of *Alexander*; but that he writ the names and deſignations of the witneſſes lower down, in ſuch manner, that, had the two lines containing them been extended, the firſt would have paſſed *through* the ſubſcription of *Alexander*, and the other *below* it.

Such was the appearance of the diſpoſition; and the truſtee of *Alexander* contended, that it had been fraudfully obtained, and that every legal nullity might in equity be pleaded for ſetting it aſide: he *objected* therefore, that the deed was null by *Act* 5. *Parl.* 1681, which provides, that *the witneſſes ſhall be deſigned in the body of the writ, otherways to bear no faith in judgment, nor outwith.* Now, in the preſent caſe, the names and deſignations of the witneſſes are, in part, below the ſubſcription of the diſponer; and therefore cannot be ſaid to be inſerted in the body of the writing. Nothing is in law termed the deed of any man, which is not authenticated by his ſubſcription; and nothing that is below his ſubſcription, can, in the nature of the thing, be authenticated by it. If a deed were not to terminate at the ſubſcription of the party, the

names

names and deſignations of the witneſſes might be ſubjoined even on the blank ſide of the ſheet, whereon the deed is written; for that, if *the body of the writing* end not at the ſubſcription of the party, it can only end at the extremity of the paper itſelf. Farther, when writings are ſubſcribed, there is often left a blank ſpace for the teſting clauſe, which is afterwards inſerted, altho' neither the parties nor the witneſſes be preſent; this method, in itſelf irregular, but authoriſed by practice, proceeds evidently on an implied conſent of the parties; who, by leaving a ſufficient blank, are underſtood to mean that it ſhould be filled up with that clauſe, which is by law required for compleating of the deed; but this preſumption ceaſes, when, as in the preſent caſe, a perſon ſubſcribes his name in ſuch manner as not to leave ſufficient room for the inſertion of the teſting clauſe, and his purpoſe is then underſtood to be, that the deed ſhould remain for ever, as it was when he ſigned it, ineffectual and improbative: hence it follows, that he who is poſſeſſed of ſuch writing, may not, by means of a raſure, make way for that eſſential clauſe which the granter of the deed had by his method of ſubſcribing excluded. Laſtly, If this deed ſhould be found valid, it will follow, that, whenever the deſignations of witneſſes happen to be omitted in a deed, any perſon may invent deſignations, and ſubjoin them below the ſubſcription of the party; or, if there be no room for them there, may eraſe a ſufficient number of words, and inſert them above the ſubſcription of the party; by which means, the regulations introduced by the act 1681, might be conſtantly eluded.

*Anſwered* for *John Dury:* The diſpoſition by *Alexander* was neither fraudfully obtained, nor without a juſt and adequate cauſe: the objection reſolves into a criticiſm on the words *body of the writ*; but our acts of Parliament are not ſo accurately framed as to admit of ſuch critical interpretations: that, in explaining them, ſome latitude muſt be uſed, appears from this clauſe in the act 1681: in ſtrictneſs of ſpeech, *the body* ought to be diſtinguiſhed from *the head*, or beginning, and *the foot*, or cloſe of the writing. Now, according to this literal interpretation of the clauſe, there has never been any deed executed in *Scotland*, in ſuch form as to be ſecured from this ſtatutory nullity; for the names and deſignations of the inſtrumentary witneſſes are never inſerted in the body of the writing, but uniformly ſubjoined at the cloſe of it. So fatal might be the conſequences of a literal interpretation of this act; but, its true intendment is no other than that the names and deſignations of inſtrumentary witneſſes ſhould be narrated in the deed itſelf, in contradiſtinction to the former practice, which permitted extrinſic evidence to be taken in proof of theſe deſignations: and hence it has been found, that a bond was not null, altho' the writer of it was not otherways deſigned than by adding theſe words, *and writer hereof*, to his ſubſcription as a witneſs, 26th *July* 1716, *Dronan* againſt *Montgomery*.

Neither has any ſtatute provided, that the ſigning of the parties ſhould be in ſuch manner below the whole of the deed, as that it may properly be termed a ſubſcription. The King ſuperſcribes; and marginal notes, which muſt neceſſarily be ſigned by the parties, are not ſubſcribed; and leaſt of all does this rule take place, with reſpect to the teſting clauſe, which is generally, and agreeably to law, filled up after the ſignature of the parties. D

" The Lords repelled the objection.

Act. Sir *David Dalrymple & Boſwell.* Alt. *Scrymgeour & R. Craigie.* Reporter *Tinwald.* Clerk *Kirkpatrick.*

N° LXXVI.

N° LXXVI. 16th *June* 1753.

*ROBERT CORMACK*

againſt

*GEORGE ROGER.*

*ROBERT CORMACK*, obtained decreet, before the Bailie of *Leith*, againſt *George Roger*, for payment of a certain ſum of money; and gave in to the Lords a bill for horning upon this decreet.

The Lord Ordinary reported the bill to the Lords. The reaſon of doubting whether the bill could paſs was, That the Bailie of *Leith* is not the Bailie of a Royal burgh, *Leith* being only a burgh of barony: and tho' part of *Leith* lies within the royalty of *Edinburgh*; yet the Bailie of *Leith*, is not even in that light a Bailie of a Royal burgh, but only the delegate of the Magiſtrates of *Edinburgh*; neither is it now known with certainty, what part of *Leith* is within the Royalty.

It was obſerved, that hornings had frequently been granted on ſuch decreets, but they had paſſed of courſe, and not *cauſa cognita*.

" The Lords refuſed the bill." B

Reporter, *Drummore*.

N° LXXVII. 3d *July* 1753.

*WILLIAM GLOUG*

againſt

*JOHN MACINTOSH.*

*MACINTOSH* being purſued by *Gloug* for payment of certain vacant ſtipends, *Objected* Preſcription By act 9. *Seſs.* 1. *Parl.* 2. *Charl.* II.

*Anſwered* for the purſuer, The act is a correctory law, it mentions *Miniſter's ſtipends* only, and may not be extended to *vacant ſtipends*. The ſtipends of miniſters are an alimentary proviſion, and, by reaſon of their ſpecial privileges, may be ſpeedily collected; they are therefore ſubjected to a ſhort preſcription. Vacant ſtipends reſemble them in name only; they are not of an alimentary nature, have not the ſame privileges, nor are comprehended under the words of the ſtatute; to them therefore the quinquennial preſcription does not extend.

*Pleaded* for the defender: The expreſſion *vacant ſtipends* is indeed improper; but our ſtatutes are not framed with critical accuracy; and, ſince in act 52. *Seſſ.* 1. *Parl.* 1. *Charl.* II. *vacant ſtipends* are termed *the ſtipends of vacant kirks*, they may well be comprehended under the denomination of *the ſtipends of miniſters*. The quinquennial preſcription was introduced for the benefit of the heritors liable in payment of ſtipends; vacant ſtipends, as well as miniſter's ſtipends, fall under the reaſon of the law; and the former ought to be ſubjected to the preſcription, as well as the latter.

" The Lords ſuſtained the defence of preſcription." D

Act. *J. Craigie.* Alt. *Macintoſh.* Reporter, *Minto.*

N° LXXVIII. 3d *July* 1753.

Colonel *ABERCROMBY*,

againſt

*JAMES GORDON* of *Ardmealie*.

BY a charter under the Great Seal, dated 1733, proceeding upon the reſignation of *Peter Gordon*, the barony of *Leuchrie* was granted to him in life-rent, and to *Archibald* his eldeſt ſon, *&c.* in fee, whom failing, to his ſecond ſon the defender, *&c.* reſerving to the father full power and liberty, to ſell, anailzie and diſpone the ſaid barony, either gratuitouſly, or for onerous cauſes; or to charge the ſame with debt; or to grant tacks thereof, for what term, and for what rent, he ſhould think proper; and to alter the courſe of ſucceſſion, without the conſent of the ſaid *Archibald*, or *James* his ſon. Upon this charter, infeftment followed in the ſame year 1733.

*Archibald* having deceas'd without iſſue, *Peter Gordon* the father executed a deed in *July* 1752, aſſigning his liferent-right, and diſcharging and renouncing his whole reſerved powers and faculties, in favour of *James* the defender.

At *Michaelmas* 1752, the defender upon theſe titles, was inrolled in the roll of electors for the county of *Bamff*, as apparent heir to his brother *Archibald*. The purſuer offered a complaint againſt this inrolment to the court of Seſſion, and objected, 1*mo*, That *Archibald* the defender's predeceſſor had not, when alive, any title to be inrolled; for that by the act 1681. *Charl.* II. *Parl.* 3. *cap.* 21. among the qualifications of voters (other than thoſe claiming as apparent heirs) it is required, that they be infeft in property or ſuperiority, and in poſſeſſion, *&c.* and by act 12. *Ann. cap.* 6. it is enacted, that no infeftment, taken upon any redeemable right whatſoever, except proper wadſets, adjudications, or apprizings, allowed by act 1681, ſhall intitle the perſon ſo infeft to vote or be elected. Now, the right of *Archibald* being a redeemable and merely nominal right, he, while alive, was barred by theſe acts from having any title to vote. If ſo, after his death, the defender can have no title, merely as his apparent heir. In the next place, the predeceſſor's right being thus inſufficient in itſelf, it cannot be aided by the renunciation of the reſerved powers in favour of the heir. Diſſimilar or inſufficient titles cannot be joined together.

*Anſwered* for the defender upon the firſt point, *viz. Archibald*'s right to be inrolled: That, in the firſt place, *Archibald*'s right did not fall under the intention of the act 12. *Ann.* which was to prevent the devices of multiplying votes; for in this caſe, one vote only was intended, *viz.* to the father in virtue of his liferent, if he choſe to claim it; to the ſon, if the father did not claim. In the next place, the father's reſerved faculties could not be any objection to *Archibald*'s right; for *Archibald* was the Crown's vaſſal: he had a property in terms of the act 1681, which property, tho' defeaſible, being ſuch as fathers uſually give to their ſons, yet could not be conſtrued to be one of the redeemable rights which would fall under 12. *Ann.* The redeemable rights there mentioned, would ſeem to be only ſuch, where there is a proper right of reverſion eſtabliſhed in a third party, which is a real right tranſmiſſible to heirs and ſucceſſors. But in this caſe, the faculties reſerved to the father, are merely perſonal, and, if not

not exerciſed, muſt die with him. The act 12. *Ann.* being a correctory law, ſhould not be extended by interpretation. The right of *Archibald* was therefore good: if ſo, that of *James*, as his apparent heir, muſt be good too.

But, 2*do*, ſuppoſing the right of *Archibald* to have been a redeemable right in terms of 12. *Ann.* yet the renunciation of the faculties in favour of *James*, removed that barr, and gives *James* an abſolute property: for had the renunciation been made in favour of *Archibald* while he lived, there would have been no objection; what difference can there be, if it was made after his death in favour of *James*? Or, in another light: if the father's death would have completed *James*'s right, why ſhould not a renunciation in his favour do as much? Many ſimilar inſtances may be given. Suppoſe a predeceſſor's right were an infeftment, upon an adjudication whereof the legal did not expire till after his death; or ſuppoſe a diſcharge of the power of redemption, granted within the legal to an adjudger's apparent heir; or ſuppoſe the right of the predeceſſor to be a baſe infeftment, and that a charter of confirmation is granted after his death, in favour of the apparent heir: in all theſe caſes, the defect in the predeceſſor's right, would be as effectually removed after his death, as it could have been in his lifetime, ſo as to intitle his apparent heir to have a vote; for this is not a conjunction of diſſimilar titles; it is only a removal of a barr or defect. Beſides, in many caſes, the Lords are in uſe to conjoin diſſimilar titles. *Hamilton* of *Ardrie*, was allowed to join to the valuation of his own lands, that of certain lands in which his wife was infeft, 19th *January* 1745.

*Replied* for the purſuer upon the firſt point: That the father's reſerved faculties were plainly ſuch, as made *Archibald*'s right merely nominal; ſo that he could not be ſaid to be infeft in property, in terms of the act 1681, nor irredeemably, in terms of 12. *Ann.* Could votes be made in this manner, every man might make as many as his valuation would admit of, without diminiſhing his eſtate; for he could revoke all his conveyances upon the day after the election. From hence it is evident, that *Archibald*'s right alone could not avail his apparent heir.

Upon the ſecond point: The right as apparent heir could not be aided by the renunciation of the faculties, for this reaſon, that the titles of an apparent heir as ſuch, can only be thoſe of his predeceſſor. Now, this renunciation was never a right in the predeceſſor; it was a new right granted to *James* himſelf. In proof of this, ſuppoſe *Archibald* had been in debt, and his creditors had charged *James* to enter heir to him; *James* by renouncing to enter heir, and the father by a revocation of *Archibald*'s right, could have diſappointed *Archibald*'s creditors. Theſe creditors could not have pleaded, that the renunciation in favour of *James*, augmented the right of *Archibald*.

With regard to the arguments, that the father's renunciation in favour of *James*, ſhould have the ſame effect as if he had died, it is obvious the caſes are no way parallel; for, had the father died, *James* would have taken by ſucceſſion; whereas, in the preſent caſe, he takes by purchaſe. The two acts of parliament above mentioned, make ſundry rules touching the taking by ſucceſſion, and taking by purchaſe. If an heir takes by purchaſe, that is, if he founds upon a new right granted to himſelf, the law will conſider him as a purchaſer; and he muſt not only be infeft in purſuance of the act 1681, but muſt be year and day infeft, in purſuance of 12. *Ann.*

If

If again he takes by ſucceſſion, then, in caſe his predeceſſor's titles were ſufficient to give ſuch predeceſſor a vote, the heir, in terms of the act 1681, may reſt upon his apparency alone; but if ſuch predeceſſor's titles were not ſufficient, in that caſe, the heir's apparency would not avail him: he muſt be infeft; though indeed in this laſt caſe, it does not appear there would be any neceſſity that this infeftment ſhould have ſtood year and day: for as he takes by ſucceſſion, he does not fall under the *proviſo* of 12. *Ann.* which ſeems only to regard thoſe who take by purchaſe. From theſe rules it will appear, that in none of the caſes put for the defender, could an heir have a right to vote without being infeft.

As to the joining of diſſimilar titles, the inſtance mentioned does not apply: for altho' the valuations of different lands, held by different titles, may be joined to make up the *quantum* of extent; yet two inſufficient titles cannot be joined to make one good title.

Upon the whole, the objection ſtands good, that *Archibald*'s right was merely nominal, and the renounciation was a new right granted to *James*.

" The Lords ſuſtained the objection, found the complaint well founded, " and ordained *James Gordon* to be expunged from the roll." S

Act. *R. Craigie, A Lockhart.* Alt. *Advocatus, James Ferguſon.* Clerk, *Kirkpatrick.*

N° LXXIX. 6th *July* 1753.

*JAMES DALGLEISH*

againſt

*ROBERT HAMILTON.*

*DALGLEISH* purſued a ranking and ſale of the lands of *Weſter-Abden*, and called, as the common debtor, " *George Hamilton*, coo- " per in *London*, ſon and apparent heir to the deceased *George Hamilton* of " *Weſter-Abden*."

Objected for *Robert Hamilton* another of the creditors on the eſtate of *Weſter-Abden:* This ſale cannot proceed, for that the common debtor is not called, his name being not *George*, but *William*. " The Lords ſu- " ſtained the objection," altho' it was pleaded for *Dalgleiſh*, that the deſcription above narrated could not be applied to any other perſon whatever than the common debtor; and that the certainty of the deſcription ought to ſupply the error in the chriſtian name. D

Act. *Garden.* Alt. *Brown.* Clerk, *Murray.*

N° LXXX. 20th *July* 1753.

*ALEXANDER JAMIESON*, Sailor in *Torry*,

againſt

*WILLIAM HUTTON*, Ship-Maſter in *Torry-Burn.*

IN 1746, *William Hutton* went a voyage, from *Torry-burn*, to *Gottenburgh*, as maſter of a veſſel called the *Loyal James*, having on board ſeven hands; and, in his return home, the veſſel ſprung a-leak, and was ready

ready to periſh, when a *French* privateer, happening to come up with her, took the crew on board, and immediately the *Loyal James* ſunk.

A few days after this, the privateer meeting with a *Dutch* ſhip, put the whole crew of the *Loyal James* on board of her, except *Alexander Jamieſon*, who was detained as a hoſtage that an equal number of *French* priſoners might be releaſed; and it appeared from a proof, that *William Hutton* had ſuggeſted to the captain of the privateer, that *Alexander Jamieſon* was the propereſt perſon to be detained. *Jamieſon* was carried to *Dunkirk*, and remained priſoner there for five months, when an exchange of priſoners was made.

After his return to *Scotland*, he brought an action againſt *William Hutton* for his wages and maintenance during the five months he had been detained priſoner.

*Pleaded* for *William Hutton*, 1ſt, That no action lies at the inſtance of the purſuer againſt him or any of the crew, for wages or maintenance during the time of his being a priſoner, as it was not on their account that he was made or remained a priſoner: they were all made priſoners by the maſter of the privateer, who might have kept them all as ſuch; but he, for his own conveniency, choſe to liberate them all except one, whom he kept under this condition, that he ſhould remain priſoner till eight *French* priſoners ſhould be relieved. This was the act and deed of the *French* captain only; and the defender and crew's getting their liberty did no damage to the purſuer, nor was his condition worſe than if the privateer had carried them all priſoners to *Dunkirk*.

This caſe is altogether different from one's being made a hoſtage till the ranſom-money for a ſhip and cargo be paid; for in that caſe the hoſtage remains on account of the proprietors of the ſhip and cargo, who therefore muſt pay him his wages, and the time of his remaining priſoner depends upon their paying the ranſom-money: but the endurance of the purſuer's captivity did not depend on the defender, but on the time when the exchange of priſoners ſhould be made, which was regulated by the cartels eſtabliſhed between the nations at war.

2*dly*, At no rate can the defender be lyable, *in ſolidum*, to the purſuer, becauſe the defender was not profited by the liberty granted to the reſt of the crew: as ſoon as his ſhip was deſerted, all connexion betwixt him and the reſt of the crew ceaſed, and therefore ſuppoſing ſomething to be due by the crew to the purſuer, becauſe they obtained their liberty when he was detained as hoſtage till as many *French* priſoners ſhould be relieved; yet the defender can only be lyable for one eight part of that ſum.

The defenders having ſuggeſted *Jamieſon* as the moſt proper perſon to be detained, cannot make him liable for the whole; he gave no commiſſion or order for the purſuer to ſtay, having no power to do ſo; but only gave his opinion, *tanquam vir bonus*, when the captain of the privateer aſked, Which of the crew would ſuffer leaſt by being detained: and it muſt be admitted, that he herein acted honeſtly and humanely, as the defender was then only a boy, had no family to care for, and could earn leſs wages than any of the reſt of the crew when at liberty.

*Anſwered* for the purſuer to the firſt defence, That all the crew were profited by his captivity, as they thereby obtained their liberty and were put in a condition of doing for themſelves, and therefore it was agreeable to law and equity that he ſhould be indemnified by them of the loſs he ſuſtained thro' five month's confinement.

To the ſecond, That it is laid down as a rule in the ſea-laws of different ſtates, particularly by the laws of *Oleron*, of *Wiſbug*, and of the *Hanſe* towns, that if a ſailor is taken by *Corſairs* in the ſhip's ſervice, the maſter of the ſhip is bound to redeem him and pay his wages during his captivity; and altho' theſe are not the laws of this country, yet they ought to be regarded as founded upon the principles of humanity and juſtice, which dictate, that a maſter of a ſhip, who contracts with ſailors expoſed to ſo many hazards, ſhould be bound, ex *bono et æquo*, to refund any extraordinary damage ſuſtained by them in his ſervice. But whatever may be the rule in general, the defender ought in this particular caſe to be liable to the purſuer, *in ſolidum*, becauſe he pitched upon the purſuer as the perſon to be detained; whereas that ought to have been determined by lot. It is true that the defender had no right to pitch upon him: but ſeeing he did ſo, and acted as maſter after the connexion betwixt him and the crew was diſſolved, he muſt be liable to the purſuer for the damages ſuſtained by him thro' his captivity.

" The Lords found it proved, that the purſuer was pitched upon by " the defender to remain as hoſtage with the *French* privateer, and, " in reſpect the defender and the reſt of the crew did obtain " their liberty upon the detention of the purſuer, found the pur- " ſuer intitled to the damage ſuſtained by him beſides his mainte- " nance, and modified the damage to *L* 1 : 15 *s. per* month during " the time he was detained; and reſerved action to the defender " for his relief againſt all concerned." B

Act. *Ro. Dick.* Alt. *Ro. Bruce & Garden.* Clerk *Kirkpatrick.*

N° LXXXI. 20th *June* 1753.

## *JAMES SPALDING*

againſt

## The HERETORS of the Pariſh of *Kirkmichael.*

BY charter under the Great Seal dated in 1615, *David Spalding* of *Aſhintully* had right to the patronage of the church of *Kirkmichael.*

In 1678, *Andrew Spalding* of *Aſhintully* obtained, upon his own reſignation, a charter under the Great Seal, containing a *novodamus* of the lands of *Aſhintully*, and of the patronage and teinds of the ſaid pariſh in the following words; " *Una cum advocatione, donatione et jure patro-* " *natus eccleſiæ parochialis et parochiæ de Kirkmichael, cum decimis, rectoriis* " *et vicariis ejuſdem.*" This charter proceeds upon a ſignature ſuperſcribed by King *Charles* II. and ſubſcribed by the officers of ſtate; and there is a doquet ſubjoined to the ſignature, ſigned by the proper officers, and addreſſed to his Majeſty, ſetting forth what was the import of the ſignature, and particularly mentioning, that it gave right to " the pa- " tronage of *Kirkmichael*, teinds, perſonage and vicarage thereof;" and the charter was ratified in Parliament, *anno* 1681.

*James Spalding* having right by aſſignation from *Spalding* of *Aſhintully* to certain bygone teinds of the ſaid pariſh, brought a proceſs againſt the heretors for payment; and the heretors having denyed that the purſuer's cedent

cedent had any right to the teinds, he contended that he had right, both *qua* patron in virtue of the 23d act Parl. 1690, and alſo by the charter 1678.

*Pleaded* for the heretors, That ſuppoſing *Spalding* of *Aſhintully* to be patron of the pariſh of *Kirkmichael*, yet neither the words nor the ſpirit of the act 1690 gave him any right to the teinds of the pariſh; for the ſtatute only gives the patron right to the teinds, " which are not " heretably diſponed." Now as the teinds of this pariſh belonged to the abbacy of *Dumferline*, (as appears by a tack dated in 1595, granted by Q. *Anne*, with conſent of K. *James* VI. her huſband, to *Ogilvie* of *Balfour*, and which recites, " That he and his predeceſſors had been " kindly tenants to the abbots of *Dumferline* in the teinds of the ſaid " pariſh,") they were diſponed by King *James* VI. along with the other teinds belonging to the ſaid abbacy, in favour of Q. *Anne* and the heirs procreate betwixt his Majeſty and the Queen, whom failing, to his Majeſty his heirs and ſucceſſors whatſoever in the crown of *Scotland*; and therefore could not fall under the words of the act 1690 granting to patrons the right of teinds not heretably diſponed: neither did the teinds fall under the ſpirit or intention of the ſtatue, for the patron had in effect the ſame right to the teinds before the act 1690 as after it; for it was lawful and uſual for the patron to covenant with the perſon to whom he intended to grant a preſentation, that, upon his admiſſion, he ſhould grant to a truſtee for the patron a tack of the whole teinds of his benefice during his incumbency, and five years thereafter, reſerving only ſuch a tack-duty as ſhould be a competent ſtipend. And as upon taking away the right of preſentation by the act 1690, it was foreſeen that the patron would be deprived of this benefit, therefore the act gave him the ſuperplus teinds directly, which before he had by the circuit of tacks: but as the teinds belonging to the abbacy of *Dumferling* had been diſponed to Q. *Anne* and her heirs, the patron could no ways have right to them either before or after the act 1690.

Neither does the charter 1678 give any right to the teinds; for, 1*ſt*, the words there uſed are the common technical words made uſe of when a right of patronage, and no more, is intended to be granted, whereby as the patronage of the Kirk, ſo alſo the patronage of the teinds is conferred. 2*dly*, In ſeveral of the clauſes of this charter, the patronage only is mentioned and not the teinds: particularly in the clauſe erecting the barony, the patronage is incorporated into the barony without any mention of the teinds in the diſpenſation with taking one ſeaſine, and in the *Tenendas*. 3*dly*, The charter proceeds upon *Andrew Spalding* of *Aſkintully*'s own reſignation with an expreſs reference to the charter 1615, and therefore could give no right to the teinds, which, it is admitted, did not formerly belong to *Aſhintully*. It is true that the charter 1678 contains a clauſe *de novodamus*, and it is alſo true that ſuch a clauſe, when the ſignature is ſuperſcribed by the King, as the ſignature 1678 was, may confer a new grant; but as in this caſe, reference is had to the charter 1615, it cannot be underſtood to do ſo, and is no more than a renewal of the former right.

*Anſwered* for the purſuer, That his cedent's right to the teinds is good by the act 1690; for the words of the act give the reſpective patrons right to all teinds which then remained with the crown undiſponed: and tho' the teinds of the abbacy of *Dumferling* had been heritably diſponed by King *James* VI. to Q. *Anne*; yet, as they had reverted to the crown long before the

the act 1690, they are to be conſidered in the ſame light as if they had never been diſponed.

And independant of the act 1690, *Aſhintully* had right to the teinds by the charter 1678; and the words uſed in that charter are ſuch as are natural and proper, and ſuch as are commonly uſed when teinds are conveyed. When a right of patronage only is conveyed, the words generally are, *Cum advocatione, donatione, et jure patronatus eccleſiæ et parochiæ de A. rectoriæ et vicariæ ejuſdem*; whereas when teinds are intended to be conveyed along with the patronage, the words generally are, as in the preſent caſe, *Cum advocatione, donatione, et jure patronatus eccleſiæ et parochiæ de A. cum decimis tam rectoriis quam vicariis ejuſdem.*

The teinds are expreſsly mentioned both in the diſpoſitive clauſe and in the clauſe *de novodamus:* and tho' they are not expreſsly repeated in ſome other clauſes, yet they are ſufficiently comprehended under the general words, *viz.* " The barony comprehending the lands, patro-" nage and others above ſpecified." And that the teinds were intended to be conveyed, is paſt all doubt from the doquet ſubjoined to the ſignature, which expreſsly mentions the teinds. Further, the ratification of this charter in Parliament mentions the teinds, parſonage and viccarage ſeparately and diſtinct from the patronage. It is of no import that the charter 1678 proceeds upon *Andrew Spalding*'s own reſignation, and refers to the charter 1615 by which the teinds were not conveyed; for the charter 1678 is no ways limited to what was granted by the charter 1615, which is only referred to as erecting the lands into a barony, and *Andrew Spalding* or his predeceſſors might have acquired right to the teinds betwixt the date of that charter and 1678. But ſuppoſe they had not, the clauſe *de novodamus* in the charter 1678, proceeding on a ſignature ſuperſcribed by his Majeſty, was ſufficient to give *Aſhintully* a right to the teinds; for the chief purpoſe of a *novodamus* is to convey what did not before belong to the obtainer, or to ſecure againſt any defect in his former right. Accordingly it was found in the caſe of the Archbiſhop of *Glaſgow* againſt *Scot* of *Ancrum*, that a clauſe of *novodamus* in the King's charter to the Archbiſhop in 1608 was ſufficient to give him and his ſucceſſors a right to the patronage of *Ancrum* tho' the Archbiſhop could ſhow no antecedent right in his predeceſſors to that patronage.

" The Lords ſuſtained the purſuer's title."

*N. B.* As the Lords were clear that the teinds were conveyed by the charter 1678, they gave no opinion on the queſtion ariſing from the act 1690. B

Act. *Geo. Brown.* Alt. *Ro. Craigie.* Reporter Lord *Drummore.* Clerk *Forbes.*

N° LXXXII. 26th *July* 1753.

Colonel *ABERCROMBIE*

againſt

*WILLIAM BAIRD* of *Auchmeddin.*

THE defender was inrolled in the roll of freeholders in the county of *Bamff*, upon producing as an evidence of the old extent of his lands

lands, an extract from the records of chancery, of a retour dated in the 1628; which extract bore, that the lands therein mentioned then holden of the Earl of *Marſhal*, *valuerunt*, *tempore pacis*, *ſummam decem mercarum monetae praedict.*

In a complaint of this inrolment, it was *Objected:* That a retour of lands holding of a ſubject at the date of the retour, was not ſufficient evidence of the old extent: for that, as the taxations formerly payable to the crown, were proportioned upon the crown's vaſſals, according to the old extent, it was neceſſary the extent of the lands of ſuch vaſſals ſhould be fixt and known, and it is to be ſuppoſed, that for this reaſon the act 1744 *Jam.* III. *Par.* 7. *cap.* 55. directs, " That retours ſhould contain the auld " extent." But with reſpect to lands held of ſubjects, this regulation was unneceſſary, becauſe the vaſſals of ſubjects were not directly liable to the King's taxations, but were only ſo to their own ſuperiors in relief of ſuch taxation: and it was argued, that this relief was not in proportion to the true old extent, but was according to the benefit theſe ſubvaſſals had by their fews; or according to the agreement they made with their ſuperiors. In ſupport of this it appears, that in many charters granted by ſubject ſuperiors, the old extent had been ſcrewed up to be the ſame with the few-duty, and had been ſo returned by juries, who were under no neceſſity to inquire of the real old extent, except where the lands were held of the king or prince. And this hypotheſis beſt accounts for the *proviſo* in the act 1681. *Char.* II. *Par.* 3. *cap.* 21. " That the old extent muſt be di- " ſtinct from the few-duties in few-lands," in which caſe the Court hath always refuſed to ſuſtain the retour as a proof of the old extent.

*Anſwered* for the defender: That the act 1744, without diſtinction, appoints all retours to contain the old and new extent. All retours, without diſtinction, are upon a brief from the Chancery to the King's judges. Without diſtinction they are the verdicts of a jury upon oath, which verdicts, until falſified in courſe of law, the Court is bound to take for proof. To ſpeak of two old extents for the ſame lands, *viz.* of one in reſpect of the ſuperiority, and another in reſpect of the property, is a thing unheard of in our law. The act 1681 requires indeed, that the old extent be diſtinct from the few-duty, which is the caſe here; but it makes no diſtinction of old extents, that is, it gives no ground to ſuppoſe, that there ever were two old extents in reſpect of the ſame lands.

In like manner, the act 16. *Geo.* II. mentions retours in general without diſtinction. How then can the Court diſtinguiſh? Before this laſt act, the Court has found charters alone to be evidence of the old extent. By this act all other evidence of the old extent, except that of the retours prior to 1681 is cut off. The purſuer's doctrine would reduce this evidence to a ſtill more narrow baſis: for it would exclude above one half of the retours in *Scotland.*

" The Lords repelled the objection to the retour, that the ſame, being " of lands holding of a ſubject, is not ſufficient evidence of the old " extent." s

For the purſuer, *R. Craigie*, *A. Lockhart*, Clerk. *Kirkpatrick.* For the defender, *Ja. Ferguſon*, *Ro. Dundas.*

N° LXXXIII. 16th *June* 1753.

## *ELIZABETH BANNERMAN* Supplicant.

*Bannerman* having arreſted certain ſums in the hands of *James Salmon*, due by him to her debtor, obtained decreet of forthcoming. *Salmon*, in a ſuſpenſion, pleaded, That he had lawfully paid the debt, for that the arreſtment in his hands had been looſed upon caution.

*Anſwered.* Intimation of looſing the arreſtment had not been made to the arreſter, therefore the payment unwarranted; for that, 1*mo*, The will of letters of looſing arreſtments uniformly, is that the executor thereof intimate the looſing of the arreſtment to the arreſter, and deliver to him a copy, containing the day of looſing of the arreſtment, witneſſes preſent thereat, and cautioner found therein; otherwiſe that the arreſtment ſtand and remain unlooſed.

2*do*, This ſeems to be agreeable to reaſon, becauſe the cautioner, tho' good at the time of finding caution, may become inſolvent, before the arreſter knows that the arreſtment was looſed, or who is cautioner, ſo as to have an opportunity to proſecute him.

*Replied* for *Salmon* the arreſtee: ſuch intimation is not required by the act 1617. *Ja.* VI. *Parl.* 22. *cap.* 17. The danger pretended is imaginary, ſeeing that act of Parliament provides all caution to be found to the clerk of the bills, who is liable for the ſufficiency of the cautioner. Further, the will of letters of arreſtment, is only to ſecure the ſubject till caution be found. Of this the arreſter may be certiorated at the Bill-chamber, which is a place of record, patent to all the lieges. Before the act 1617, when caution was found to a meſſenger only, intimation was neceſſary, and tho' now no longer ſo, yet the ſtyle of the letters continues the ſame. This point was decided in a caſe obſerved by *Forbes*, 18. *July* 1707, *Crichton* againſt *Borthwick*.

The Lord Ordinary ſuſtained the reaſon of ſuſpenſion, and, a reclaiming petition being offered,

" The Lords refuſed the ſame, and adhered." S

For *Bannerman*, *David Græme*.

N° LXXXIV. 28th *July* 1753.

## *WILLIAM URQUHART* of *Meldrum*, againſt The OFFICERS of STATE and HERITORS of *Cromarty*.

IN the caſe betwixt theſe parties, concerning the right of the patronage of the kirk of *Cromarty*; for which, ſee what is marked above, N° 15. the Lord Ordinary reported the points remitted to him by the interlocutor of that date, *viz.* " Whether the Biſhop of *Roſs*'s right to the patron-" age from Sir *Robert Innes*, by the contract 1636, is preferable to the " purſuer's right derived from the ſaid Sir *Robert Innes*, by diſpoſition in " 1656; and, alſo, whether the purſuer's right be ſecured by the 6th Act " *Parl.*

" *Parl.* 1695, he having purchaſed the patronage together with Sir *Ken-*
" *neth Mackenzie*'s eſtate, at a judicial ſale."

On the firſt point, the purſuer *Objected:* That the contract 1636, whereby Sir *Robert Innes* diſponed the patronage to the Biſhop, was null by act 80th *Parl.* 1579; becauſe, tho' the names of three witneſſes to the ſubſcription of Sir *Robert Innes* be inſerted, yet theſe witneſſes are not deſigned, unleſs the defenders will condeſcend who were the witneſſes, and aſtruct the condeſcendence.

*Anſwered* for the defenders: That there was no neceſſity for deſigning the witneſſes until the ſtatute 1681; for the act 1579 only requires, that witneſſes be deſigned in deeds, not ſubſcribed by the party, but by notaries; and it appears from the records, that, betwixt the 1579 and 1681, great numbers of deeds were executed without deſigning the witneſſes.

*Replied* for the purſuer: That it is evident the clauſe of the act 1579, requiring witneſſes to be " denominate by their ſpecial dwelling places, or " ſome other evident tokens," refers as well to deeds ſubſcribed by the party, as to thoſe ſubſcribed by notaries. Sir *George Mackenzie* conſiders it in this view, in his obſervations on that act: and ſo have the Lords in many caſes; particularly 15th *July* 1664, *Colvil* againſt executors of Lord *Colvil*; and, 3d *February* 1665, *Falconer* againſt Earl of *Kinghorn*; where they found, that if the witneſſes were not deſigned in the deed, the uſer of it behoved to condeſcend on them, and prove his condeſcendence: and what is enacted by the 5th act *Parl.* 1681, is that the deed ſhall not be ſuppliable by condeſcending on the witneſſes, if they be not deſigned in the deed itſelf.

" The Lords ſuſtained the objection, That the witneſſes deſignations
" were not inſert in the body of the contract 1636; but found, that
" the ſame might be ſupplied by condeſcending on their deſignations,
" and aſtructing the ſame." *Reversed.*

The purſuer farther *Objected*, That ſuppoſing the defenders ſhould be able to condeſcend on the witneſſes, and aſtruct their condeſcendence, yet the purſuer's right is preferable, becauſe derived from the Earl of *Cromarty*, to whom Sir *Robert Innes*, in 1656, diſponed this patronage along with the barony of *Delny*, upon which the Earl expede a charter and was infeft: and therefore, tho' he had the poſterior diſpoſition, yet he was preferable to the Biſhop of *Roſs*, by having firſt compleated title by infeftment; for the infeftment ſaid to be taken by the Biſhop in 1636, is null, for ſeveral reaſons, to be afterwards mentioned.

*Anſwered* for the defenders: That a patronage, by its proper and original nature, is neither a feudal ſubject, nor held by a feudal tenure, but is a perſonal right or privilege like nobility, and is deſigned by the canoniſts to be *jus idoneos rectores in eccleſiis inſtituendos epiſcopo offerendi*; *quod alicui in eccleſia acquiritur, quod eo ipſe, vel ejus auctores, eccleſiam poſuerint, aedificarint, vel opibus non minimum auxerint, conſenſu epiſcopi adhibito, ex quo jure, cum utilitate, honor et onus ſimul reſultant.* Calvin. *voce patronatus.* Agreeable to this, Lord *Stair*, *B.* 2. *tit.* 8. § 33. ſays, " That tho' patron-
" ages do ordinarily paſs as annexed to lands by charters of boroughs, ba-
" ronies or Lordſhips, yet they may paſs without infeftment as *jura incor-*
" *poralia.*" This patronage was held according to the original nature of the right, by the Biſhop or chapter of *Roſs* without any infeftment, till the year 1588, when it was annexed to the barony of *Delny*, and with that barony, granted by King *James* VI. to Sir *William Keith*; and ſo ſoon

as

as it was diſunited from the barony, which it was by the contract 1636, it returned to be of its original nature, that is an incorporeal right, held and tranſmiſſible without infeftment.

*Replied* for the purſuer: That as there are proper ſymbols eſtabliſhed for the tradition of patronages, as well as of other real rights, ſo the general rule ought to obtain as to them, that the firſt infeftment compleats the tranſmiſſion; but whatever be the caſe of patronages in general, it is certain that ſuch as have been annexed to lands, and tranſmitted by infeftment alongſt with them, muſt continue to be tranſmitted in the ſame manner; and as the right to this patronage was eſtabliſhed in the perſon of Sir *Robert Innes* by infeftment, ſo he could not be diveſted of it without infeftment taken on the contract or diſpoſition.

" The Lords found, that Sir *Robert Innes* could not be compleatly de-
" nuded of the patronage in favour of the Biſhop, without ſeiſin
" following in the perſon of the Biſhop."

The defenders having produced, from the record, an extract of a ſeiſin taken by the Biſhop of *Roſs* in 1637; the purſuer objected, that the ſeiſin was null, becaſe it did not bear the delivery of ſymbolical poſſeſſion by the Baily to the Attorney, by a Pſalm-book, the ordinary ſymbol for a patronage; but only bears in general, that ſeiſin was given, the ſolemnities uſed in like caſes being obſerved: and as ſuch general clauſes had often by the Court been found inſufficient to ſupport the executions of legal diligence, far leſs could they ſupport an inſtrument of ſeiſin.

*Anſwered* for the defenders: 1*ſt*, That it was but a modern invention to take infeftments upon patronages, and therefore there were no eſtabliſhed ſymbols for giving ſuch infeftments: none ſuch are mentioned by *Craig* or *Stair*; and tho' in ſome inſtances we find a Pſalm-book given as a ſymbol for a right of patronage, yet ſeiſins of ſuch rights were often given without ſuch ſymbols.

2*dly*, As the inſtrument bears that ſeiſin was given *juris ſolennitatibus in ſimilibus fieri conſuetis debite obſervatis*; this was ſufficient: as has often been found in ſimilar caſes; particularly 21ſt *March* 1628, *Maxwel* againſt *Portake*, when the ſeiſin of a ſalmon-fiſhing was ſuſtained, tho' it did not bear *per traditionem Cymbæ et retis*, but only that the Bailie came to the ground of the land and fiſhing, and gave ſtate and ſeiſin of the ſame.

" The Lords repelled the objection, in reſpect that the ſeiſin bore, that
" the uſual ſolemnities in the like caſe were obſerved."

The purſuer further objected, That the ſeiſin was null, becauſe the extract produced, and the copy in the regiſter, wanted the *ſignum* of the notary which ought to contain his motto and name, and is his proper ſubſcription: that a ſeiſin was null for want of this, the Lords found in 1731, in the caſe of the creditors of *Jordanhill*, tho' the inſtrument was all wrote by the notary's own hand.

*Anſwered* for the defenders: That it appears from the copy in the regiſter, and the extract thereof produced, that the principal inſtrument of ſeiſin was atteſted and ſubſcribed by the notary in the uſual manner; the docquet, *Ego vero Gulielmus Lauder*, &c. being wrote by the notary's own hand. It is true, the *ſignum* and motto of the notary are not copied into the regiſter; but itappears from a certificate from the keeper of the records in the lower Parliament houſe, that in the particular regiſter of ſeiſins for the ſhire of *Inverneſs*, (in which record the Biſhop's ſeiſin is regiſtrated) from 1636 to 1643, the notary's *ſignum* is not inſert in any copy of

of a ſeiſin in the regiſter; but it is not from thence to be preſumed that ſuch was wanting in the principal inſtrument.

" The Lords repelled the objection." *Affirmed.*

On the ſecond point, *viz.* if the purſuer's right be ſecured by the 6th act *Parl.* 1695, it was pleaded for the purſuer, That by the ſaid act it is ſtatute, " That the purchaſer, at a judicial ſale, paying the price offered, " to the creditors, as they ſhall be ranked by the Lords of Seſſion, ſhall " be for ever exonered, and the lands and others purchaſed diſburden- " ed of all debts and deeds of the bankrupt, or his predeceſſors, from " whom he had right." That the purſuer purchaſed this patronage at the judicial ſale of Sir *Kenneth Mackenzie*'s eſtate, and is therefore ſecured by that clauſe of the act, from any deed done by Sir *Robert Innes*, from whom Sir *Kenneth* derived right. And to this it will be no good anſwer to ſay, that the Crown, in right of the Biſhop, does not claim upon any deed done by the predeceſſors of Sir *Kenneth Mackenzie*, but upon a deed done by Sir *Robert Innes*, whereby the Biſhop was preferable both to Sir *Kenneth* and to his predeceſſors; for it can make no difference, whether the deed was done by one of the bankrupt's anceſtors, or by one of his authors; the intention of the ſtatute was to make the purchaſer ſecure in all events, and ſo the Lords have conſtructed it as often as the caſe has occurred, particularly 21ſt *June* 1720, *John Chalmers* againſt Sir *Andrew Myreton*, obſerved in the Dict. of Deciſ. vol. 2. p. 312. and in 1739, Bailie *Dundas* having purchaſed a tenement, at a ſale carried on by the creditors of *Thomas Wyllie*, Lady *Rollo* claimed right to the tenement, her father having adjudged it from *Henry Wyllie*, *Thomas*'s younger brother, and repreſented that *Henry*'s right was preferable, in reſpect that the right of *Thomas* proceeded from his father, and was under a faculty to alter, which the father exerciſed by diſponing the tenement to *Henry*: yet the Lords found that Mr. *Dundas*'s right was ſecured by the act 1695. The claim in that caſe was indeed founded on a deed of the bankrupt's father, but then the bankrupt did not derive right from him as heir, but by a ſingular title.

*Anſwered* for the defenders: That as the King was not made a party to the proceſs of ſale, the decreet of ſale could not prejudge him: and it would be abſurd and unjuſt, that the eſtate of a third party, who was not called, and had no opportunity to object, ſhould be ſold for payment of the bankrupt's debts: but by no ſtatute is any ſuch iniquity introduced. The deſign of the acts concerning the ſale of bankrupt eſtates, is to transfer to the purchaſer for the uſe of the creditors, the eſtate that truly was in the bankrupt; but not to create for their uſe, any new eſtate or intereſt which never belonged to them. And the chief ſcope of the act 1695, is to provide in favour of the purchaſer a method whereby he might pay or conſign the price: and the meaning of the clauſe founded on by the purſuer, is that the purchaſer ſo paying or conſigning, ſhall have all right or title which belonged to the bankrupt or his predeceſſors, and that was deſcendible or competent to him, and which he or his creditors jointly had in their power to have made over to the purchaſer by voluntary conveyances: but not that the purchaſer ſhall be preferable to third parties, who may have derived a prior right to the lands, from a remote author of the bankrupt's predeceſſor, and who thereby had a preferable title to any that was in the bankrupt himſelf. That this is the ſenſe of the act, is further evident from the words that immediately follow in the ſame clauſe, *viz.*

" And that the bankrupt, or his heirs or apparent heirs, or creditors with-
" out exception of minority, not compearing, or conceiving themſelves
" to be prejudged, ſhall only have acceſs to purſue the receivers of the price
" and their heirs." All this proviſion is made in reſpect of the perſons who were intitled to claim in right of the bankrupt himſelf: but there is nothing in the ſtatute importing, that the eſtate of one not called in the proceſs, can be ſold for another man's debts.

" The Lords found, that the right of the Crown was not barred by
" the decreet of ſale." B

Act. *Ferguſon.* Alt. *Advocatus & Boſwel.* Reporter, *Kilkerran.* Clerk, *Gibſone.*

N° LXXXV. 31ſt *July* 1753.

*PATRICK HALDANE*, Eſqr;

againſt

*ARCHIBALD* Duke of *Douglas.*

THE Duke of *Douglas* was debtor to his ſiſter Lady *Jean Douglas*, in the ſum of 20,000 merks *Scots*, due by a bond of proviſion bearing annualrent, granted to Lady *Jean*, by *James* Marquis of *Douglas* her father.

The Duke, in *March* 1718, gave Lady *Jean* a further proviſion, by a bond for 30,000 merks *Scots* bearing annualrent, but revocable at pleaſure.

In 1728 and 1731, Lady *Jean* borrowed from the Duke two ſums, amounting to *L.* 750 *Sterl.* for which ſhe granted bonds in the uſual form, bearing annualrent and penalty.

Notwithſtanding of theſe bonds, the Duke continued to pay to Lady *Jean* the full annualrent of the ſaid 20,000 and 30,000 merks *Scots*, and an additional annuity of *L.* 161 *Sterl.* provided to her, as marked in the caſe bewixt Mr. *Haldane* and the Duke, 15th *February* laſt, N° 66, to *Whit.* 1749, when he ſtop'd payment.

Lady *Jean* being debtor to Mr. *Haldane* in the ſum of *L.* 500 *Sterl.* ſhe aſſigned him to as much of the 20,000 merks bond as would pay that ſum and annualrents thereof; and Mr. *Haldane* brought an action againſt the Duke for payment.

*Pleaded* for the Duke: That Lady *Jean* was debtor to him in the ſum of *L.* 750 *Sterl.* and annualrents thereof, ſince 1731, which extinguiſhed the ſaid bond of 20,000 merks, and made a balance due by Lady *Jean* to the Duke.

*Anſwered* for Mr. *Haldane*: That, both by the civil and *Scots* law, compenſation operates *ipſo jure* from the date of the concourſe, at whatever time it be proponed; and therefore Lady *Jean* being firſt creditor to the Duke in 20,000 merks *Scots*, and in the year 1731, becoming debtor to him in *L.* 750 *Sterl.* ſhe from that period remained creditor to him only in *L.* 361. 2 s. 2⅔ d. *Sterl.* with the annualrent thereof. That ſuch was the effect of compenſation by the civil law, is certain from *L.* 21. *ff. de compenſationibus*; and *L.* 4. *cod. eod.* which preciſely determines the preſent queſtion. The words are, *Si conſtat pecuniam invicem deberi, ipſo jure pro ſoluto compenſationem haberi oportet, ex eo tempore ex quo ab utraque parte debetur, utique quoad concurrentes quantitates, ejuſque ſolius quod amplius apud alterum*

*eſt*

*eſt uſurae debentur*. It is true that the defender muſt propone compenſation, otherwiſe the judge cannot know it, and ſo far it is *facti*: yet being proponed, the law determines the effect of it, which is altogether *juris*, See *Perezius ad codicem, tit. de compenſat. n.* 5. *et Voet. dict. tit. ff. n.* 2. And that compenſation has the ſame effect by the law of *Scotland*, is the opinion of Sir *George Mackenzie*, *inſt. b.* 3. *tit.* 4. and of Lord *Stair*, *b.* 1. *tit.* 18. § 6. his Lordſhip ſays, " Compenſation is a kind of liberation, " as being equivalent to payment: for thereby two liquid obligations do " extinguiſh each other, *ipſo jure*, and not only *ope exceptionis* : for albeit " compenſation cannot operate if it be not prepared, as neither can pay- " ment ; yet both *perimunt obligationem ipſo jure*, and therefore are not " arbitrary to either party to propone or not propone, as they pleaſe; but " any third party having intereſt, may propone the ſame which they can- " not hinder." The law ſo ſtanding, the payments made by the Duke to his ſiſter *ex gratia* beyond what he was debtor for, cannot alter the caſe, nor can he now demand back, or plead upon theſe payments which he gave her, as they muſt be conſidered as gifted; but the purſuer in her right, is intitled to demand from the Duke, the *L.* 361 *Sterl.* which, in 1731, his Grace owed to his ſiſter Lady *Jean*, above the ſum compenſated by Lady *Jean*'s bonds, and the annualrent thereof ſince *Whitſunday* 1749, when the Duke ſtop'd payment.

*Replied* for the Duke: That by the law of *Scotland*, as appears from act 141. *Parl.* 1592, compenſation is a defence on exception, which a defender may propone or not, as he thinks proper; and when he propones it, it muſt be ſuſtained in the manner he pleads it, and not according as the purſuer finds it moſt convenient for him. The concourſe of the debt due by Lady *Jean* to the Duke, had no effect upon the bond of proviſion; both theſe debts ſubſiſted, the Duke was debtor to her in 20,000 merks *Scots*, and ſhe to him in *L.* 750 *Sterl.* and the Duke might have aſſigned away the *L.* 750. in which caſe he could not have pleaded compenſation, but behoved to have paid the full 20,000 merks, after which Lady *Jean* behoved to have paid the *L.* 750 to the aſſigney. And ſeeing the Duke did not, till the commencement of this action, plead the compenſation, but paid the full annualrent of the 20,000 merks, notwithſtanding of Lady *Jean*'s being debtor to him in *L.* 750 *Sterl*; ſhe and her aſſigney cannot now refuſe to pay the ſum in her bond and annualrents thereof, or to admit the compenſation founded thereon.

" The Lords ſuſtained the compenſation proponed by the Duke of *Dou-*
" *glas*, upon the two bonds granted by Lady *Jean* to his Grace, both
" as to principal and intereſt due on the ſaid bonds, to extinguiſh the
" bond in queſtion for 20,000 merks and intereſt thereof. B

Act. *Advocatus*, Alt. *R. Craigie*, Clerk, *Kirkpatrick*.

N° LXXXVI. 31ſt *July* 1753.

Mr. *JOHN GOLDIE*,

againſt

The TRUSTEES of *Murray* of *Cherrytrees*.

*MARGARET Moriſon*, proprietor of the lands of *Maiſon-Dieu*, when fifteen years of age and on death-bed, executed a ſettlement of

of her eſtate, in favour of *James Murray* of *Cherrytrees*: ſhe died about four weeks after the date of this deed, without heirs.

Mr. *John Goldie*, her uncle by the mother's ſide, obtained from the Crown a gift of the ſaid lands of *Maiſon-Dieu*, as having fallen to his Majeſty as *ultimus hæres*.

In conſequence of this gift, Mr. *Goldie* raiſed a declaration of his right, wherein he called Mr. *Murray* of *Cherrytrees*, and concluded for reduction of the deed granted in favour of Mr. *Murray* by *Margaret Moriſon*, as being granted during her minority and on death-bed.

Mr. *Murray* died during the dependence, and the proceſs having been transferred againſt his eldeſt ſon, he refuſed to enter heir or to defend, whereupon decreet was pronounced in favour of Mr. *Goldie*, after which he inſiſted againſt the tenants of *Maiſon-Dieu*, for maills and duties; in which proceſs, the truſtees to whom Mr. *Murray* had diſponed his eſtate for certain uſes compeared, and were admitted to be heard, as marked 28. *November* laſt, N° 38.

It was pleaded for the truſtees: That in this caſe there was no place for the King's donatar, becauſe *Margaret Moriſon* having executed a diſpoſition of her eſtate before her death, in favour of Mr. *Murray*, the lands thereby belonged to him and not to the Crown; and tho' the diſpoſition was executed upon death-bed, yet the law of death-bed being introduced ſingly in favour of heirs, as appears from the ſtatutes *Willielmi*, *cap.* 13. and from the deeds being valid if conſented to by the heir, and as it is a limitation of that natural right which a man has of diſpoſing upon his property, it is not to be extended in favour of the Crown or its donatar; for the Crown does not ſucceed as heir, but takes the eſtate *tanquam bona vacantia* as belonging to no body. Any difficulty which occurs upon this point, ariſes from an abuſe of words, the King being ſaid to take as *ultimus hæres*; but there is in this caſe really no ſucceſſion, but there being none to ſucceed in the character of heir, the right veſts in the Crown *jure coronæ*. That the matter ought to be thus conſidered, appears from *Craig*, *Tit. de Regalibus*, § 30. And Lord *Stair* treats of this right not under the head of ſucceſſion, but in *B.* 3. *T.* 3. § 47. under the general title of confiſcation, where he has theſe words, "*Ultimus hæres* may ſeem to "be a ſucceſſion from the dead, and to come in amongſt other heirs; yet "tho' it hath the reſemblance of an heir, becauſe it hath effect where "there is no other heir, and makes the heritage liable to pay the defunct's "debts, *it is only a caduciary confiſcation of the defunct's eſtate*, with the "burden of his debt, *but no proper ſucceſſion to him therein.*" And therefore to extend the law of death-bed in ſupport of an eſcheat or caduciary confiſcation, or to defeat a ſettlement of an eſtate executed by the defunct who had no agnates or lawful heirs, whilſt *ſanae mentis* tho' on death-bed, would be extremely hard, and would be an extenſion of the law of death-bed, to a caſe which does not fall within the reaſon or parview thereof. And tho' a baſtard cannot diſpoſe of his heritage on death-bed in prejudice of the Crown; it will not from thence follow, that another perſon who has no heirs, cannot diſpoſe of his; for the reaſon why a baſtard cannot diſpone, is becauſe he has not *teſtamenti factionem ob defectum natalium*, and a diſpoſition on death-bed even of heritage, is conſidered as a teſtament or *donatio mortis cauſa*.

As to the other reaſon of reduction founded on *Margaret Moriſon*'s minority, this depends on the ſame principles with the other ground of reduction

duction upon the head of death-bed; and therefore the ſame anſwer will ſuffice; the reſtraint upon minors is in favour of their heirs, and he who challenges the deed, muſt be heir and qualify leſion: but ſurely it was no leſion for a minor to diſpone her eſtate to prevent its becoming caduciary or being confiſcate.

*Anſwered* for the purſuer: 1*ſt*. That the law of death-bed was introduced in favour of all ſorts of heirs, whether thoſe ſucceeding *ab inteſtato*, or thoſe named by the defunct when in health; and there is no reaſon for denying the benefit of this law to the King, who, tho' in ſome particulars he differs from other heirs, not being univerſally liable for the defunct's debts, yet ſucceeds, and is conſidered *as heir*, *Stair*, *L.* 4. *Tit.* 13. Beſides, the law of death-bed was not introduced ſingly in favour of heirs, but likeways in favour of dying perſons, that they might be free from undue ſolicitations; and becauſe they are preſumed not to have ſufficient firmneſs of judgment for diſpoſing of their heritage. This is the account given of the matter, *Reg. Mag. L.* 2. *C.* 18. § 9. *Unde praeſumitur, quod ſi quis in infirmitate poſitus, quaſi ad mortem, terram ſuam diſtribuere caeperit, quod in ſanitate facere noluit, hoc potius ex favore animi, quam ex mentis deliberatione, evenerit*: and by *Craig*, *L.* 2. *dieg.* 1. § 18. With theſe authors Lord *Stair* agrees, *L.* 3. *T.* 4. § 27. " The reaſon of this cuſtom " may be conjectured, not only from the nature of feudal rights not diſ- " poſable by teſtaments, but only by inveſtiture; but alſo for public utili- " ty, becauſe perſons on death-bed are weak, the mind being eaſily af- " fected by the trouble of the body, and ſo is eaſy to be wrought upon " by inſinuations and importunities to do deeds contrary to their intereſt " and former reſolutions." If theſe authors are right in the account they give of the foundation of this law, it muſt take place, whoever is to ſucceed to the heritage; and there appears no reaſon why perſons who have no heirs *jure ſanguinis*, ſhould be expoſed to diſturbance and importunities when dying, more than the reſt of his Majeſty's ſubjects.

2*dly*, It is admitted and is proved by the authority of moſt of our law-books, that a baſtard cannot diſpoſe of his heritage on death-bed, in prejudice of the Crown: now the King's ſucceſſion to a baſtard is a ſpecies of his ſucceſſion as *ultimus haeres*; for when a baſtard has no iſſue, he can have no agnates, being *ex incerto patre*, and therefore his eſtate falls to the Crown: and ſeeing, in ſuch a caſe, the law of death-bed takes place, there is no reaſon why it ſhould not alſo obtain when the King ſucceeds as laſt heir, becauſe the defunct left no heirs of blood. It is not owing to a baſtard's not having *teſtamenti factio* that he cannot diſpoſe of his heritage on death-bed; for this right has no connection with the diſpoſal of heritage: no lawful born ſubject can diſpoſe of his heritage by teſtament; nor can a baſtard diſpoſe of his heritage on death-bed, tho' the King has by legitimation granted him the power of teſting.

3*dly*, It appears from the tenor of the declarator of the King's right as laſt heir, that it has been underſtood, that his right could not be defeated by a death-bed deed; for it calls on all and ſundry having or pretending intereſt, " to hear and ſee it found and declared, that all lands and herita- " ges, *&c.* which belonged to the defunct at the time of his deceaſe, *or* " *the time of contracting the diſeaſe whereof he died*, do belong to the dona- " tor," *&c. Stair*, *L.* 4. *Tit.* 13. *p.* 582.

The other reaſon of reduction founded on the minority of *Margaret Moriſon*, is alſo relevant: for minors are debarred from altering the courſe

of ſucceſſion to their lands, becauſe they are preſumed, during their minority, not to have ſufficient ſtability of judgment for making ſuch an alteration; and this reaſon takes place whoever be the heir that is prejudged by the alteration.

" The Lords found, that it was competent to the Crown's donatar to " object to the diſpoſition granted by the deceas'd *Margaret Moriſon* " to *James Murray* of *Cherrytrees*, upon the head of death-bed, and " ſuſtained the objection." *Affirmed*. B

Act. *Advocatus et J. Ferguſon.* Alt. *Lockhart.* Reporter, *Juſtice-Clerk.* Clerk, *Juſtice.*

N° LXXXVII. 7th *Auguſt* 1753.

*ANDREW GREY*

againſt

*CHARLES STEWART*, *JAMES GREY* and *JAMES MILLAR.*

*JAMES GREY* expoſed his lands to be ſold by public roup to the higheſt offerer. At the roup, *James Millar* was ſeemingly the higheſt offerer, and *Andrew Grey* was the ſecond. Soon after the roup, *James Grey* the ſeller of the lands diſponed them to *Charles Stewart*, for whom it was pretended, that *Millar* had offered by commiſſion. *Andrew Grey* the ſecond offerer inſiſted in a reduction of the ſale made at the roup to *Millar*, and of the diſpoſition made in conſequence of that ſale by *James Grey* to *Charles Stewart*; and he contended, that *Millar* was only what is called a *white bonnet*, *viz.* a perſon employed by the ſeller to raiſe the price, without any intention of buying for himſelf, and ſecured that he ſhould not be bound by his offer. The purſuer further alledged, that *Charles Stewart* was partaker of the fraud, in ſo far as he knew that *Millar* was employed by the ſeller as a white bonnet.

At adviſing a proof in this caſe, it was mentioned from the bench, that this too common practice of employing white bonnets at roups, was a manifeſt cheat. The perſon who advertiſes a ſale by auction, pledges his faith to the public, that he is to ſell to the higheſt bidder, and is not to buy for himſelf. In this caſe the purſuer was really the higheſt offerer, ſeeing the offer of white bonnet is no offer at all. That in the caſe of the ſale of *Keith*, the Court was clearly of this opinion upon the general point, though the deciſion went upon the particular circumſtances of the caſe.

" The Lords found, that the offer made at the roup by *James Millar*, " was made by him by commiſſion from, and for the behoof of, " *James Grey* the ſeller, and was illegal and fraudulent; and that " therefore *Andrew Grey*, the immediate preceeding offerer, ought " to be preferred as the higheſt offerer at the ſaid roup: and found ſufficient evidence, that *Charles Stewart*, who was preſent at the ſaid " roup, was partaker with *James Grey* of the ſaid fraud, and therefore ſuſtained the reaſon of reduction of the diſpoſition by *James* " *Grey* to the ſaid *Charles Stewart*, and ſeiſin following thereon, and " reduced the ſame; and found the ſaid *James Grey* obliged, on the " purſuer's making payment to him of the price offered by him at " the ſaid roup, to diſpone the lands to the purſuer in terms of the " articles

" articles and conditions of roup: and found the defenders liable to " the purſuer in the expences of this proceſs." s

Act. *Boſwel.* Alt. *Hay.* Clerk, *Juſtice.*

N° LXXXVIII. 10th *Auguſt* 1753.

*AGNES* and *JEAN BRODIES*

againſt

*JAMES STEPHEN* Commiſſary-depute of *Morray.*

*AGNES* and *Jean Brodies* obtained themſelves deſcerned joint executors dative *qua* neareſt of kin to their deceas'd ſiſter *Margaret Brodie*, and gave up in the inventary nothing but a ſmall part of the houſhold-furniture which had belonged to her. The Commiſſary-depute refuſed to give out the confirmation, becauſe the inventary did not contain all the moveables of the defunct, and inſiſted that the executors ſhould give up inventary upon oath, bearing that the inventaries contained the whole movables which belonged to the defunct, and had come to their knowledge.

*Agnes* and *Jean Brodies* gave in a ſummary complaint to the Court of Seſſion, complaining of the above refuſal, and argued, that as by the act 24. *Parl.* 1690. it is provided, that the neareſt of kin ſhall have liberty to confirm or not to confirm the teſtaments of perſons deceas'd, as they think proper, and ſhall not be compelled to confirm by the Commiſſaries or their Fiſcals; ſo when the neareſt of kin chooſes to confirm, he may confirm part by giving up in inventary as much as he pleaſes, and cannot be compelled by the Commiſſary to give up more. And ſuch partial confirmations have been found by late deciſions of their Lordſhips, ſufficient to veſt the right of the whole moveables in the perſon of the neareſt of kin.

To this complaint the Commiſſary-depute anſwered, that by the inſtructions to the Commiſſaries, no teſtament is to be confirmed, till the executor make oath that the inventary contains all the moveables of the defunct, which have come to the executor's knowledge; and the ſtile of the confirmation is, that the inventary is faithfully given up by the exetor. And altho', ſince the ſaid act of Parliament, a Commiſſary cannot compell perſons to confirm a defunct's teſtament, yet if they do confirm, they ought to give up inventaries faithfully, and upon oath, eſpecially where creditors are intereſted, and inſiſt for an oath; and in the preſent caſe, the reſpondent is himſelf a creditor to the defunct.

Before the complaint and anſwers were adviſed, the Commiſſary-depute had given out the confirmation, and therefore the complainers inſiſted only for the expences of the complaint.

" The Lords found, that the reſpondent did wrong in refuſing to give " out the confirmation mentioned in the complaint, and found him " liable to the complainers in the expences of the complaint." B

Act. *Lockhart.* Alt. *Tho. Hay.* Clerk, *Pringle.*

N° LXXXIX.

N° LXXXIX. 11th *Auguſt* 1753.

*STEPHEN BROOMFIELD* of *Mains*

againſt

*JOHN YOUNG* of *Shankfoot.*

BY minute of tack, dated 9th *April* 1750, *Stephen Broomfield* ſet to *John Young* the lands of *Haſſendean* for the ſpace of five years, for which *Young* was to pay a certain yearly tack-duty, and the minute concludes with theſe words, " And all parties agree, that this minute be extended on " ſtamped paper, betwixt and the firſt of *May*, under the penalty of " *L.* 10 *Sterling*, to be paid by the party failier to the party obſerver or " willing to obſerve."

A few days after the date of the ſaid minute, *John Young* intimated under form of inſtrument, to *Stephen Broomfield*, that he reſiled from the agreement of entering into a five years tack; whereupon *Stephen Broomfield* brought a proceſs againſt him, concluding that he ſhould be obliged to enter into a tack of the ſaid lands, and to perform all the ſtipulations incumbent on him by the ſaid minute.

*Pleaded* for the defender: That he can be no further liable than to pay the penalty of *L.* 10 *Sterling*, as the minute does not bear that the penalty was to be paid *by and attour performance*, and therefore each party was at liberty to reſile from the bargain upon payment of the penalty. Penalties were firſt introduced by the *Roman* lawyers in obligations of this kind, *quae in facto conſiſtunt*, becauſe if the fact was not performed, the creditor had an action *ad damnum et intereſſe*: but as this damage was always uncertain and illiquid, and depended upon a difficult proof; to prevent theſe queſtions, penalties were adjected to ſuch contracts, which penalties were underſtood to come in place of and to liquidate the *damnum et intereſſe*, as is plain from § 7. *Inſt. de verb. oblig.* From the example of the *Roman* law, penalties are with us uſually adjected to contracts which conſiſt in performing any thing, and the ſame conſtruction muſt take place that theſe penalties ſtand for the damage in caſe of not performance; and therefore where performance is to be inſiſted for, it is provided by the contract, that the penalty ſhall be paid *by and attour performance*, and where that clauſe is not added, the Lords have found that the penalty only is due. *Forbes*, 29th *July* 1706, *Bairdner* againſt *Dryſdale.*

*Anſwered* for the purſuer: That the adding of a penalty does not give the parties an election of either performing the obligation or paying the penalty as they pleaſe, *Stair Inſt. L.* 1. *Tit.* 17. § 20; the penalty being only added as a compulſive on the debtor to fulfil, and to be a fund for paying the expences of compelling performance; though theſe words, *by and attour performance* be commonly added, yet that is only *ob majorem cautelam*, and tho' they be not added, yet the parties are obliged to perform their contract if it be in their power: as it is only *loco facti impraeſtabilis*, that *damnum et intereſſe* ſucceeds. The caſe cited by the defender from *Forbes*, was a fact of this laſt kind; the defender having obliged himſelf under a penalty to cauſe a third party ſubſcribe a diſpoſition to lands, and as the defender could not compel the third party to ſubſcribe the diſpoſition, he could only be liable in the penalty: but where the fact

is

is preſtable by the defender, he muſt perform it, if the purſuer inſiſt for performance; as the Lords have frequently found: particularly 19. *March* 1630, *Crichton contra Pirie*: and 27, *December* 1695, *Beatie contra Lambie*.

" The Lords repelled the defence, that the defender was only obliged " to extend the minute on ſtamped paper, under the penalty of " *L.* 10 *Sterl.* and found him liable in that penalty, the ſame being " expended; and alſo found him liable in payment of the bygone " rents already fallen due, and of the rents which ſhall become due " in time coming, in terms of the minute of tack." B

Act. *Geo. Pringle.* Alt. *And. Pringle.*

N° XC. 12th *Auguſt* 1753.

Major *ARTHUR FORBES*

againſt

Mrs. *KATHARINE MAITLAND.*

SIR *Charles Maitland* of *Pitreichie*, grandfather of both the parties, in the year 1700, executed an entail by procuratory, " in favours of his " only ſon *Charles* and the heirs-male of his body; which failing, to any o- " ther heirs-male to be procreated of Sir *Charles*'s own body; which failing, " to the heirs-female to be lawfully procreated of *Charles* the ſon's body, the " eldeſt ſucceeding without diviſion; which failing, to *Jean Maitland* his " eldeſt daughter, and the heirs-male of her body; which failing, to *Mary* " *Maitland* his ſecond daughter, and the heirs-male of her body; which " failing, to his other daughters, and their heirs-male, in their order, under " certain prohibitions and irritancies."

*Charles* the ſon ſurvived his father, and, upon the aforeſaid procuratory, expeded a charter of reſignation under the great ſeal of the ſaid eſtate, in terms of the entail; but died ſoon after, without taking infeftment upon the precept contained in the charter, leaving no iſſue of his body.

By his death, the ſucceſſion opened to Mrs. *Jean* his eldeſt ſiſter, who procured herſelf ſerved *neareſt and lawful heir of tailzie to her brother in general*, in order to carry the right of the aforeſaid charter and precept therein contained; and the ſervice being duly retoured to Chancery, ſhe was accordingly infeft in the lands, in virtue of the precept contained in the charter.

Mrs. *Jean Maitland* being thus infeft in the lands, diſponed part thereof in favours of Mr. *Charles Maitland* her only ſon, who expeded infeftment thereupon in his mother's life; and, after her death, he made up a title to the reſt of the tailzied eſtate, as heir-male in ſpecial to her, ſuppoſing it to have been duly veſted in her perſon.

Upon theſe titles, Mr. *Charles Maitland* made a new ſettlement of this eſtate, by diſponing the ſame " to himſelf and the heirs whatſoever of " his body; which failing, to Mrs. *Katharine* and *Anne Maitlands* his ſi- " ſters, in their order, and the heirs of their reſpective bodies; and failing " of all theſe, to Major *Arthur Forbes* the eldeſt ſon of Mrs. *Mary Mait-* " *land*, the ſecond daughter of Sir *Charles*."

This deed was challenged by Major *Forbes*, as heir of the aforeſaid entail, as proceeding *à non habente*.

And the ground of the challenge was, that the retour of the ſervice of Mrs. *Jean Maitland* was defective and null, in regard it only bore, "*Quod* "*dict. Magiſtra Joanna Maitland eſt legitima et propinquior haeres talliae*, "*dict. quondam Domini Caroli Maitland ſui fratris germani*," without expreſſing the deed of tailzie in virtue of which ſhe was ſo ſerved.

And, in ſupport of this objection, it was *pleaded* for Major *Forbes*: That the anſwer or return of the jury, in the words above quoted, was utterly inept and inſufficient for the purpoſe for which it was uſed; becauſe all that was there found by the jury might have been true, and yet it might not have been true, that *Jean Maitland* had right to the charter and precept of ſeiſin, granted to her brother *Charles*, upon the tailzie of *Pitreichie:* ſhe might have been heir of tailzie to her brother by virtue of other entails in the ſame or in different lands, made by the ſame perſon or by different perſons, with the ſame or with different ſubſtitutions; and to all of which the ſucceſſion might then have been open to her, and ſhe minded to take the benefit of the one, and not of the others. And as the above general and indefinite anſwer in the ſervice could not apply to one of theſe entails more than another, the conſequence is, that it can apply to none of them.

A general ſervice of a perſon as heir of line or heir of conqueſt to another, is finding a thing the import whereof is known and fixed in law; theſe characters being created, and the effect of the ſervice of ſuch heirs determined by the law itſelf. But an heir of tailzie or proviſion has no ſuch character defined by the law: he is not *haeres natus*, but *factus*, by the deed of proviſion or tailzie that renders him ſuch; and therefore the general anſwer of the inqueſt, *That Jean Maitland was neareſt and lawful heir of tailzie to her brother Charles*, without telling in what eſtate, or by virtue of what ſettlement, or by whom ſuch ſettlement was made, was ſaying nothing at all; and therefore the retour was imperfect and null, and could eſtabliſh no right in *Jean Maitland*. And the diſpoſition from her in favours of her ſon Mr. *Charles*, of part of the eſtate, and his ſervice as heir of tailzie to her in the remainder, were alſo void and null; and conſequently the gratuitous ſettlement in favours of him and his ſiſters falls to the ground, as proceeding *à non habente*; and the deciſion *Edgar* againſt *Maxwell* of *Barncleugh*, 21*ſt July* 1738, reported in the Dictionary of deciſions, *voce*, Repreſentation, *p.* 345, was quoted in ſupport of the above objection.

*Anſwered* for Mrs. *Katharine Maitland:* That it appeared from the extract of Mrs. *Jean Maitland*'s ſervice, the warrant of the retour, that ſhe claimed to be ſerved neareſt and lawful heir of tailzie to her deceas'd brother *Charles*; and, for inſtructing that claim, ſhe produced before the Judge the deed of entail by Sir *Charles Maitland* her father, as alſo the charter in favours of her brother *Charles*, containing precept of ſeiſin of the dates abovementioned: all which are fully narrated in her claim, and that her procurator craved the Bailie to remit her ſaid claim to the trial of the inqueſt; which being done, the inqueſt accordingly ſerved her neareſt and lawful heir of tailzie in general to her ſaid brother, conform to the claim: ſo that the claim and ſervice certainly referred to the tailzie and charter thereupon in favours of *Charles* her brother. And theſe being produced before the inqueſt, were proper legal evidences to them, that *Jean Maitland* was heir of tailzie to her brother in the charter and precept

upon

upon which no infeftment had followed; ſo that the objection lay ſingly on this, that the retour did not mention the particular evidence upon which the inqueſt pronounced their verdict.

As to which it was obſerved, that a retour was a decree or ſentence of the Judge Ordinary, proceeding upon the King's brieve to him directed; and that neither law nor reaſon required that a decree ſhould ſpecially expreſs the evidence upon which it proceeds. And this holds in a particular manner in ſuch ſentences, as proceed upon the verdict of an inqueſt; ſuch as in ſervices upon the brieves of mortanceſtry, where tho' the verdict of the inqueſt muſt proceed upon proper evidence of the relation of the claimer to the defunct, yet the retour never mentions upon what evidence the jury proceeded. And in ſpecial ſervices, tho' it muſt be proved before the inqueſt, that the defunct died laſt veſt and ſeiſed in the lands, *&c.* by production of his infeftments; and that the claimer is the neareſt and lawful heir in theſe infeftments, whether he be heir of line, heir-male, heir of conqueſt, or heir of tailzie; yet it is not neceſſary that the ſpecial retour mention the particular infeftments, whereby the deſtination of ſucceſſion was proved to the inqueſt. The affirmation of the inqueſt upon their great oath, that the defunct died laſt veſt and ſeiſed in the lands, and that the claimer is neareſt lawful heir of line, male or of tailzie, is ſufficient, without mentioning the deeds or records by which theſe things are proved to the jury: And if the objection above ſtated was good in law, it would be fatal to all ſpecial retours, and at once unhinge the property of the nation.

Upon theſe principles, the retour in queſtion is unexceptionable: it bears, that *Charles Maitland*, brother of the claimant, died at faith and peace of the Sovereign; *and that the claimant is neareſt lawful heir of tailzie to her ſaid brother*; that is, they find it proven, by a tailzie produced before them, that ſhe was called to her brother's ſucceſſion in ſome perſonal right deſcendable to his heirs, and conſequently muſt carry the perſonal right to the eſtate of *Pitreichie*, which, by the entail and charter thereon, was veſted in her brother; and, failing of his iſſue, deſcendable to her as heir of tailzie: and the legal import of the retour is confirmed by the uſe ſhe made of it, in obtaining herſelf preſently infeft upon the precept contained in her brother's charter; and it cannot be doubted, but that ſhe was liable to all the burdens and conditions contained in the entail, equally as if her brother had been infeft, and ſhe had made up her title upon a ſpecial retour and infeftment as heir to him. And, in ſupport of this anſwer, a deciſion was quoted, 13th *November* 1712, Earl of *Dalhouſie* againſt Lord and Lady *Hally*; and a number of inſtances were condeſcended upon, from the record of retours, of general ſervices of heirs of tailzie, in the preciſe form of the preſent retour.

And, more particularly, in anſwer to the uncertainty and want of preciſion in the retour in queſtion, with reſpect to the right intended to be taken up; *it was obſerved*, that this will apply equally to all retours upon ſervices of heirs in general, whether of line, heirs-male or of conqueſt: none of which afford evidence of the ſubjects belonging to the heir ſo ſerved; they are evidence of his intention *adire haereditatem*, and do in fact veſt him in all the ſubjects and rights devolving to him under ſuch character: and, by the ſame rule, a ſervice as heir of tailzie or proviſion, is legal evidence of the claimant's intention to repreſent the defunct as heir of proviſion, in all heritable and perſonal rights provided to the claimant, and

will

will accordingly veſt ſuch rights in him, both *actively* to claim under the proviſions made in his favours, and *paſſively* to ſubject him to the burden impoſed by the granter; and where the perſon claiming to be ſerved, does not incline to take all the proviſions made to him by the defunct; but to repreſent only with reſpect to one particular proviſion; in ſuch caſe, it will no doubt be proper, in his general ſervice, as heir of proviſion, to confine his claim and retour to the ſpecial proviſion which he intends to take up. But this is not peculiar to heirs of proviſion: it holds equally in heirs-male: ſuppoſe one perſonal right is ſettled upon heirs-male, without any burden, and that another perſonal right is ſettled to heirs-male, but under conditions that the heir does not chuſe to comply with; in ſuch caſe, the heir-male may limit his claim and retour to the ſubject that he is diſpoſed to take up, by referring to the deed ſettling that ſubject upon the heirs-male. But where a perſon claiming to be ſerved as heir-male, or heir of proviſion to a defunct, is diſpoſed to take up every part of the ſucceſſion provided to him, by various deeds; in ſuch caſe, the retour may be in general, referring to all the deeds of proviſion produced before the inqueſt, without mentioning particulars.

" The Lords repelled the objections to the general retour of the ſervice " of Mrs. *Jean Maitland* as heir of tailzie to the deceas'd Sir *Charles* " *Maitland* her brother." *Affirmed* M

Act. *Advocatus et Lockhart.* Alt. *Craigie et Ferguſon.*

*N. B.* Major *Forbes* carried this eſtate upon a ſeparate point, which is not here collected, as it turned upon the conſtitution of a ſpecial clauſe in the entail.

N° XCI. 21ſt *November* 1753.

The CREDITORS of *CARLETON*

againſt

*WILLIAM GORDON.*

IN *April* 1684, *James Gordon* executed a tailzie of his eſtate of *Carleton* holograph. By this tailzie, he diſponed the eſtate, and granted procuratory for reſigning it in favours of the heirs-male of his own body; whom failing, to *John Gordon* third ſon to *Gordon* of *Earlſton*; whom failing, to *Nathaniel Gordon* of *Gordonſton*, and their reſpective heirs-male; whom failing, to his own heirs-male whatſoever, *&c.*; under prohibitory, irritant, and reſolutive clauſes againſt altering the order of ſucceſſion, *&c.* ſelling, *&c.* and againſt contracting debts, or doing any other deeds, directly or indirectly, *above the half of the value of the eſtate.*

The procuratory was not executed by the maker of the entail: neither was the entail recorded. The firſt ſubſtitute died before the maker of the entail; and both died without iſſue-male. In 1702, *Nathaniel Gordon* the next ſubſtitute, made up his title to the procuratory in the deed of tailzie, as heir male and of proviſion to the maker of the entail: and his retour contained the prohibitory, irritant, and reſolutive clauſes; but he took no infeftment.

In the contract of marriage of *Alexander* his ſon, without taking notice of the tailzie, *Nathaniel* diſponed, as abſolute proprietor, the eſtate of *Carleton* to his ſaid ſon, with the burden of his debts, *&c.*; but the ſon was never infeft.

The

The father and ſon having contracted debts above the value of the eſtate; and adjudications being led, and the legals thereof expired, the creditors brought a proceſs of ranking and ſale of the eſtate. *William Gordon* the defender, a remote heir under the general ſubſtitution, appeared and objected: That the ſale could not proceed; becauſe, according to the prohibitory clauſe in the entail, the debts could not be ſuſtained above the half of the value of the eſtate.

*Anſwered* for the creditors: 1*mo*, That the entail, tho' executed holograph in 1634, yet was not compleat till 1688; for not till 1688 was the clauſe mentioning the date of the witneſſes ſubſcription filled up. If ſo, the tailzie fell under the firſt clauſe of the act 1685, *Jam.* VIII. *Parl.* 1. *Seſſ.* 1. *cap.* 22. by which it is provided, "that only ſuch tailzies ſhall be allowed as "are put upon the record;" but that this tailzie had never been put upon the record, ſo could not bind creditors.

*Replied* for *William Gordon*: The tailzie being holograph, was a compleat deed in 1684, without witneſſes. It was very true, that, in the ſame year, the maker, by an unneceſſary anxiety, had owned his ſubſcription before witneſſes, who then ſubſcribed; and the date of their ſubſcription was filled up in 1688. But all this operation was quite unneceſſary. The tailzie therefore being a compleat deed before the ſaid act of Parliament, could not fall under it as to the neceſſity of recording.

*Argued* for the creditors: 2*do*, That ſuppoſing in general, ſuch a tailzie as this did not fall under the act of Parliament as to the neceſſity of recording; and ſuppoſing that upon common law, deeds would be cut off where there was a prohibition to contract any debt at all; yet the caſe is different, where the half or any part of the eſtate may be burdened: for, as no regiſter ſhowed either the value of the eſtate, or when the half was exhauſted, the creditors were *in bona fide* to go any length. The caſe is ſimilar to that of a diſpoſition of lands with a general burden of the diſponer's debts, which would not ſtand in the way of the diſponee's creditors.

3*tio*, As to the creditors of *Alexander* the ſon, they are further ſecured upon the ſecond clauſe of the act 1685, which is extended to entails made even before its date, in ſo far as it appoints the proviſions and irritant clauſes to be repeated in the rights and conveyances of the heirs of tailzie, otherwiſe not to militate againſt creditors.

*Replied* for *William Gordon*: That creditors who contract with a perſon *not infeft*, do ſo upon his perſonal faith, and not upon the faith of the records; and ſo every right, however latent, which affects the debtor, muſt affect his creditors: and it is believed that, in ſuch a caſe, a diſpoſition with a general burden of the diſponer's debts, would bind the creditors of the diſponee; or, what is more, a latent back-bond of truſt, would do ſo as effectually as a truſt expreſſed in the debtor's rights, or a back-bond regiſtred in the regiſter of reverſions. This principle anſwers all the objections, whether of the whole creditors in general, or of *Alexander*'s creditors in particular: and does ſo without diſtinction, whether the tailzie was made before or after the act, or whether any part of the act has a retroſpect. For it is obvious the act of Parliament does not relate to the caſe, ſeeing it provides for the ſecurity of ſuch creditors only who have contracted *bona fide with the perſon infeft*. Upon this principle, in the caſe of the creditors of *Weſt-Shiel*, where the entail was not recorded, and where the heir had made up his titles to the procuratory by a general ſervice, without repeating the irritant clauſes in his retour, the Houſe of Lords reverſed

the interlocutor of this Court, and found, that creditors contracting with ſuch heir *not infeft* were bound by the entail.

" The Lords repelled the objection upon the act 1685; and found, that " the heir in poſſeſſion might lawfully contract debts to the extent of " the half of the value of the eſtate." S

Act. *Macdual & A. Lockhart.* Alt. *R. Craigie & Tho. Hay.* Clerk, *Juſtice.*

N° XCII. 26th *November* 1753.

Executors of Mr. *DAVID COUPER*

againſt

Mr. *JOHN OGILVY* of *Airly.*

*OGILVY* being purſued by the executors of *Couper* for payment of an account of money advanced, and expences incurred by *Couper* as doer for the family of *Airly*, *objected* the triennial preſcription.

*Anſwered* for the executors of *Couper*: The preſcription has been interrupted; for that, in the year 1722, *Ogilvy* the defender purſued *Couper* for exhibition of certain writings belonging to the family of *Airly*. *Couper* pleaded retention, until payment ſhould be made to him of his account: he was ordained to produce it; he neglected ſo to do; and he was then ordained to reſtore the writings.

It was therefore *pleaded* for the executors: That whatever interrupts the long preſcription, interrupts the ſhorter preſcriptions: now the long preſcription is interrupted, whenever the creditor *takes document upon his debt*; and there can be no more ſolemn method of taking document upon a debt, than by demanding it in judgment. And this was done in the procedure above narrated, and the triennial preſcription thereby interrupted: the account indeed, through the negligence of *Couper*, was not lodged in court; nevertheleſs, the pleading on it is as valid an interruption, as if he had brought a proceſs for payment of it, without either ingroſſing it in the ſummons, or producing it in judgment. Such proceſs would have interrupted the preſcription, and the ſame ought to be the effect of the judicial procedure in the year 1722.

*Replied* for *Ogilvy:* Altho' *Couper* pretended in the 1722, that an account was due to him; yet neither at that time, nor for twenty years after, did he produce it, or even ſpecify its extent. The preſcription cannot be interrupted by the vague allegation of an account owing; for that it would not be interrupted by a direct action brought for payment, unleſs the extent of the ſum acclaimed were therein ſpecified: it can in no ways be interrupted, unleſs the creditor bring an action within the three years; or the debtor acknowledge the debt to be due: and neither of theſe is, in this caſe, pretended.

" The Lords ſuſtained the defence of preſcription of the account libel- " led, unleſs the purſuers offer to prove the account reſting owing, " by the oath of the defender." D

Act. *D. Græme.* Alt. *J. Ferguſon.* Reporter, *Murkle.* Clerk, *Juſtice.*

N° XCIII.

N° XCIII. 27th *November* 1753.

## *DAVID GIBSON*
against
## *JAMES CAMPBELL.*

*DAVID GIBSON*, merchant in *Inverary*, ſigned, as drawer, a bill addreſſed in the following terms, " To *Archibald Campbell* tackſ-" man of *Succoth* principal, and *James Campbell* of *Raſhoily* cautioner, con-" junctly and ſeverally." Both theſe perſons accepted; but *Archibald* ſubjoined *principal*, and *James cautioner* to his acceptance. *Archibald*, who received the value of the bill became bankrupt; and *Gibſon* purſued *James Campbell* for payment.

*James Campbell* judicially acknowledged, that both the bill and its addreſs were written by himſelf; and that he had agreed to become ſurety for the ſum contained in the bill: he contended nevertheleſs, that he was not liable in payment; for that a cautionary obligation may not be conſtituted in form of a bill: and he *pleaded*, that the law holds bills, when uſed as the vehicles of commerce, to be equal to ready money, and therefore exempts them from the ſolemnities requiſite in other probative writings: in them the ſubſcription of the party conſtitutes the obligation, and renders them probative; but whenever they deviate from their proper form, their nature is underſtood to be changed; they ceaſe to be bills, and are deprived of theſe extraordinary privileges. According to theſe principles, the writing, on which this action is brought, cannot be conſidered as a bill; for that a bill preſumes value received by the accepter: now this cannot be applied to a cautioner, who receives not value himſelf, but becomes bound for the debt of another perſon. If a cautionary obligation could be conſtituted by a bill, the principal would be bound to relieve the cautioner, and the cautioner would have the benefit of the ſeptennial preſcription; and theſe things are equally inconſiſtent with the nature, and foreign to the purpoſe of bills: neither is the caſe altered by theſe words *conjunctly and ſeverally*, which are added to the addreſs: it is the acceptance, not the addreſs, which conſtitutes the obligation; the term *cautioner* qualifies the acceptance; and as the purſuer founds on this writing, he muſt found on it with all its qualities.

*Anſwered* for the purſuer: The queſtion is not, whether the defender became cautioner by his acceptance of the bill, but whether his qualified acceptance as cautioner be ſufficient to withdraw him from that obligation to which his ſimple acceptance would, in terms of the addreſs, have ſubjected him. The bill is drawn on him and his co-obligant *Archibald Campbell*, conjunctly and ſeverally: they both accept: they are therefore conjunctly and ſeverally liable; more eſpecially, as the under-writing of a bill, in what form ſoever, is, by the cuſtom of merchants, held ſufficient to bind the under-writer. But altho' it ſhould appear, that in fact the defender meant not to be bound as co-obligant, and that in law he cannot be bound as cautioner, yet muſt he ſtill be liable. It appears from his own judicial acknowledgement, that *he agreed to become cautioner for the ſum in the bill*; and as he thereby induced the purſuer to rely on his ſecurity, and to advance the money, he will not in equity be permitted, under the pretext of legal nullities, to render his engagements ineffectual.

" The

" The Lords repelled the objections againſt payment of the bill. D

Act. *J. Erſkine.* Alt. *A. Lockhart.* Clerk, *Gibſon.*

N° XCIV. 18th *December* 1753.

Duke of *DOUGLAS*

againſt

*LOCKHART.*

THE Suit was for malverſation in office as Juſtice of the peace.

The defender pleaded the ſtatute xxiv. *Geo.* II. cap. 44. reſting chiefly upon the laſt clauſe, by which it is provided, *That no action ſhall be brought againſt any Juſtice of the peace for any thing done in the execution of his office, or againſt any Conſtable, Headburrough, or other officer or perſon acting as aforeſaid, unleſs commenced within ſix calendar months after the act committed.*

*Replied* for the purſuer: The ſtatute does not extend to *Scotland*; for that the *Engliſh* law-words uſed, and the *Engliſh* law-forms referred to in this ſtatute, implied a limitation of it to *England*. Particularly, it mentions only vexatious actions brought againſt Juſtices of the peace, where the trial of theſe actions is by a jury: therefore the remedy provided by the ſtatute, cannot be applied to actions brought againſt Juſtices in *Scotland*, where trial by jury in civil caſes is unknown. That altho' the laſt clauſe of the ſtatute is rather more general than the others, yet it cannot be taken ſeparate from the others, but the whole muſt be extended or reſtricted together. In general, that it were of dangerous conſequence to the law of *Scotland*, to admit of all the *Britiſh* acts which are not expreſly limited to *England*; for in that caſe many acts, altogether inconſiſtent with our law, and which were never ſuppoſed to extend to *Scotland*, would be introduced into it. Inſtances of this are, 7. *Ann. cap.* 18. 8. *Ann. cap.* 14. 9. *Ann. cap.* 20. 10. *Ann. cap.* 20. 12. *Ann. cap.* 7. 12. *Ann. ſeſſ.* 2. *cap.* 23. 4. *Geo.* I. *cap.* 12. 11. *Geo.* I. *cap.* 29. 20. *Geo.* II. *cap.* 19.

*Anſwered* for the defender: That ſince the union, all acts of Parliament muſt be conſtrued to extend to both kingdoms, except ſuch where limitation to one of them is either expreſſed or implied. That as it frequently happens, that *Engliſh* lawyers are employed to frame the bills in Parliament, ſo theſe gentlemen naturally make uſe of the words, and refer to the forms of that law in which they are moſt verſant, without any intention of limitation to *England*; and therefore when there is equal reaſon for extenſion to both kingdoms, the uſe of words, or reference to forms, known in the *Engliſh* law only, in caſe theſe words and forms can be tranſlated into our law, will not alone imply limitation to *England*. To verify this, many inſtances may be given; in ſome of which, trials by jury of civil caſes ſeem to have been as much in the eye of the legiſlature as in the caſes now debated; particularly the acts of indemnity, 1. *Geo.* I. *Seſſ.* 2. *cap.* 39. 19. *Geo.* II. *cap.* 20.: the acts againſt gaming, 9. *Ann. cap.* 14. 12. *Geo.* II. *cap.* 28. 18. *Geo.* II. *cap.* 34.: the ſtage act, 10. *Geo.* II. *cap.* 28. upon which judgments have been given by this court, altho' the laſt clauſe of it is liable to the like objection as the clauſe in queſtion. See alſo the annual mutiny-acts, as well as 12. *Ann.*

*Seſſ.*

*Seſſ.* 2. *cap.* 16. 12. *Geo.* II. *cap.* 21. 15. *Geo.* II. *cap.* 28. 18. *Geo.* II. *cap.* 10. and 24. § 4. 19. *Geo.* II. *cap.* 21. and 37. 23. *Geo.* II. *cap.* 13. 25. *Geo.* II. *cap.* 39. Further, were the uſe of words or references to forms ſufficient to imply a limitation to *England*, what would be the uſe of an expreſs limitation in many caſes, as in 4. *Geo.* I. *cap.* 11. 2. *Geo.* II. *cap.* 25. 9. *Geo.* II. *cap.* 36.

With regard to the inſtances of ſtatutes brought to ſhow the danger of extenſion to *Scotland* by implication, theſe ſtatutes either obviouſly do not extend to *Scotland*, or if they do, their extenſion is attended with no bad conſequences.

In the preſent caſe, not only are the enacting words and purview of the act general, but no reaſon can be aſſigned why they ſhould not be ſo. The original powers of Juſtices of peace were nearly the ſame in both kingdoms. They are ſtill more aſſimilated by 6. *Ann. cap.* 6. Ever ſince that act, the *Scots* form of the commiſſions of peace is laid aſide; and in lieu of it, the *Engliſh* form is ſubſtituted. The members of the Privy-council in *England*, the ſpeaker of the houſe of Commons, and many others who have no property in *Scotland*, are put into every *Scots* commiſſion of the peace. Juſtices of the peace in *Scotland* are equally liable to vexatious proſecutions for things done in execution of their offices, as Juſtices in *England*, and by conſequence are equally entitled to the remedy provided by this act.

In the laſt place, the defender chiefly reſts upon the laſt clauſe of this act, which is intirely general, and has no reference to any *Engliſh* form of procedure whatever. Suppoſing therefore a difficulty in applying the other clauſes to *Scotland*, there appears no reaſon for not applying this.

In this caſe, the Lords, by their firſt interlocutor, found the act to extend to *Scotland*; but they did not give coſts. By their ſecond interlocutor, they found the act did not extend: but by their third and fourth interlocutors, they adhered to the firſt, and

" Found the act extends to *Scotland*." *Reversed.* s

Act. *Lockhart & Pringle.* Alt. *Ferguſon, Millar & Swinton.* Clerk, *Gibſon.*

N° XCIV. 18th *December* 1753.

Mrs. *PENUEL GRANT* and other Tutors to *WILLIAM GRANT* of *Ballendalloch*

againſt

*JAMES GRANT* in *Chapeltoun.*

IN *April* 1741, the deceas'd *Alexander Grant* of *Ballendalloch* ſet in tack to the deceas'd *William Grant* and his heirs, the lands of *Chapelton*, for the ſpace of nineteen years, from *Whitſunday* 1741. *William Grant* accordingly poſſeſſed the lands, and paid the rent ſtipulated by the tack till 1747, when he died. After this, his relict continued to poſſeſs and manage the farm; *William Grant*'s ſon being an infant.

In 1749, the relict purpoſing to marry *James Grant*, there was a written agreement entered into betwixt her and the infant's two uncles on

the father's ſide, whereby it was ſtipulated, that the relict ſhould become bound to pay at the next term of *Martinmaſs* 200 merks for behoof of the infant-heir, 100 merks to each of two infant daughters, and to aliment and educate all the three for the ſpace of ten years: and the uncles became bound that ſhe ſhould poſſeſs the tack during the years yet to run thereof. Soon after this agreement ſhe married *James Grant*, who gave his obligation to the infants for the ſaid ſums. They were alſo kept in family with him and his wife, and he poſſeſſed the lands and paid the rent to *Alexander Grant* during his life, and for ſome years after to the tutors of his infant-ſon *William Grant*.

In 1751, *William Grant*'s tutors warned *James Grant* to remove from the lands, and obtained decreet of removing againſt him before the Sheriff-Subſtitute of *Bamff*.

*James Grant* obtained a ſuſpenſion of the decreet, and *pleaded*, That the infant-ſon and heir of *William Grant* the late taxman was nether warned to remove, nor made a party to the proceſs of removing, tho' the perſon chiefly intereſted; for after his father's death, the tack belonged to him, and was not made over by him to the relict his mother by the agreement in 1749: for tho' ſhe was thereby to poſſeſs the lands, yet that was for the behoof of the infant, who was to have a certain ſum paid to him, and his yearly aliment, which was certainly a more beneficial bargain for him than if the relict had been taken bound to account for the yearly profits which might have been very uncertain: and neither is the relict warned to remove, who, if the deed 1749 had been an aſſignation, would be the tenant.

*Anſwered* for the chargers: That it is evident from the deed 1749, that the tack was thereby intended to be made over to the relict; the words are, "That the relict ſhall continue to poſſeſs this farm during "the currency of the tack that her huſband had, to which her ſon had "right, ſhe paying the rents, ſervices, cuſtoms, and others payable by "the ſaid tack in the preciſe terms thereof." Now as the tack did not contain a power to aſſign, it fell by the aſſignation, and would alſo have fallen by the relict's marriage, tho' it had originally been granted to herſelf; marriage being a legal aſſignation.

2*dly*, The ſuſpender was the perſon in poſſeſſion, who laboured the land, paid the rent, and took the diſcharges in his own name; and a maſter is only obliged to warn thoſe who are in poſſeſſion, and is not obliged to call, as in declarators or reductions, all parties having intereſt.

3*dly*, The tack founded on could not even have defended *William Grant* the original tax-man againſt a removing; becauſe it is null: the witneſſes inſert therein not having ſubſcribed it. And tho' the tutors have made ſearch for the other double of the tack amongſt *Ballendalloch*'s papers, they have not found it.

*Replied* for the ſuſpender: That the infant, who has right to the tack, is as much in poſſeſſion as one of his age can be. He remains in family with his mother and the ſuſpender, who manage the farm for the infant's behoof, tho' by the agreement 1749, a certain ſum is paid to him in place of accounting for the uncertain profits of the tack. And tho' the tack falls under a ſtatutory nullity by wanting the ſubſcription of the witneſſes, yet it is capable of homologation, and is homologated by the tackſman poſſeſſing

poſſeſſing the farm, and the maſters receiving the rent in terms of the tack.

The Lords were of opinion, that the infant ſtill had an intereſt in the tack; and that infants having right to tacks, could not poſſeſs but by others, and therefore,

" They ſuſpended the letters *ſimpliciter*." B

Act. *Lockhart & Jo. Grant.* Alt. *Garden.* Clerk, *Kirkpatrick.*

N° XCV. 5th *January* 1754.

## *ALEXANDER WILL*

againſt

## *PATRICK URQUHART.*

*PATRICK URQUHART* obtained decreet againſt *Alexander Will*, before the Commiſſary of *Aberdeen*, decerning *Alexander Will* to pay him 50 merks *Scots*, in name of damages and expences for having defamed him; and alſo ordaining him to appear in the church of *Fraſerburgh*, to aſk pardon, as is uſual in ſuch caſes.

*Alexander Will* being charged with horning upon this decreet, and incarcerated within the tolbooth of *Stirling*, he applied to the magiſtrates for an aliment, in terms of the 32d act *Parl.* 1696, which they modified to 3 s. 6 d. *Scots per* day; and ordained *Patrick Urquhart* to pay the ſame under the uſual certification.

*Patrick Urquhart* offered a bill of ſuſpenſion of this ſentence of the magiſtrates, and pleaded, that the act of Parliament was only in favour of priſoners for civil debts, that is, ſuch debts as ariſe *ex contractu* or *quaſi contractu*, and therefore could not be extended to this debt, which aroſe *ex delicto*, as was found 28th *November* 1738, *William Leſlie* ſupplicant. For, with reſpect to ſuch debts, it is a maxim, *qui non habet in ære, luat in pelle*; and priſoners for criminal cauſes are expreſsly excepted from the benefit of the act.

2*dly*, The other part of the decreet being *ad factum praeſtandum*, the act could not extend to it; for it was in *Alexander Will*'s power to have obtempered that part of it long before his incarceration.

*Anſwered* for *Alexander Will*: That the exception in the act reſpects only the caſe of criminals in order to trial, or thoſe who are incarcerated by a ſentence *in modum poenae*: neither of which is his caſe; he being incarcerated by the ordinary form of perſonal diligence for a debt, and therefore ought to have the benefit of the act, from whatever cauſe the debt aroſe. And, as to that part of the decreet appointing him to aſk pardon in the church of *Fraſerburgh*, he was willing to enact himſelf to obtemper it, if ſufficient time be allowed to him for that purpoſe.

" The Lords found, that the act of Parliament does not take place in " commitments for delicts: But, in reſpect that *Alexander Will* offered to obtemper the Commiſſary's decreet, found, that *Patrick Urquhart* ought either, on *Alexander Will*'s enacting himſelf under " the penalty of *L.* 5 *Sterling*, to obtemper the ſaid decreet as to the " *palinodea*, to ſet him at liberty, or otherways to aliment him." B

Act. Alt. *Rob. Macintoſh.*

N° XCVI.

N° XCVI. 9th *January* 1754.

Captain *ROBERT CUNNINGHAM*

againſt

*GEORGE STIRLING* Eſq;

AT the *Michaelmaſs* meeting 1753, Captain *Robert Cunningham* preſented, to the freeholders of *Stirling-ſhire*, a charter and ſeiſin in his favour of part of the lands of *Seabegs*, and a certificate that his lands ſtood rated in the ceſs books at *L.* 414 : 2 : 10. *Scots*, and claimed to be inrolled in the roll of freeholders, intitled to vote for a member to ſerve in Parliament for that county.

*George Stirling*, one of the freeholders, *objected:* That in the ceſs book 1691, theſe lands ſtand valued *in cumulo* with other lands, and were only ſeparately valued in 1739, not by a legal meeting of the Commiſſioners of Supply, but by two Commiſſioners who, without any proper authority or proof of the real rent, ordained the ſaid lands to be rated in the ceſs books at *L.* 414 : 2 : 10. and the freeholders ſuſtained the objection.

Captain *Cunningham* complained to the Lords of this judgment; and *pleaded:* That there was a great difference betwixt his caſe and that of *Leſlie* of *Melroſs*, decided 21ſt *February* laſt, where the objection, that the diviſion was made by a private meeting, was ſuſtained, becauſe the original valuation of the ſhire of *Banff*, where *Leſlie* craved to be inrolled, was extant, but the original valuation of *Stirling-ſhire* was not; and therefore there was no proper evidence of a valuation *in cumulo.*

2*dly*, That it had been the conſtant practice of the ſhire of *Stirling*, to divide valuations by ſuch private meetings.

*Anſwered* for *George Stirling* and other freeholders: That where the original valuation does not appear, recourſe muſt be had to the next beſt evidence, which here is the ceſs book 1691, whereof a copy is kept in Exchequer, and from which the valuation *in cumulo* appears. 2*dly*, Mr. *Cunningham*'s application for a diviſion in 1739, is a ſufficient evidence of a valuation *in cumulo*; and, as to the practice of the ſhire, anſwered, it has not always been ſo: and, tho' it had, no practice could authoriſe a diviſion ſo contrary to the acts of Parliament, by which the meetings of the Commiſſioners, and their method of procedure are regulated.

" The Lords diſmiſſed the complaint." B

Act. *Lockhart.* & *Jo. Grant.* Alt. *Ja. Ferguſon* & *Bruce.* Clerk, *Forbes.*

N° XCVII. 16th *January* 1754.

Sir *ARCHIBALD GRANT*

againſt

*JOHN LEITH* of *Leith-Hall.*

*JOHN LEITH* was inrolled by the freeholders of *Aberdeen-ſhire* at their *Michaelmaſs* meeting 1753. Sir *Archibald Grant* complained of the inrolment and objected: That the claim lodged by Mr. *Leith* did not ſet

ſet furth the preciſe ſum at which his lands ſtood valued; but only that their valuation exceeded *L.* 400 *Scots.*

The Lords were of opinion, that it was not neceſſary to mention the preciſe ſum in the claim, and therefore,

" They diſmiſſed the complaint." B

Act. *A. Lockhart.* Alt. *Ch. Hamilton Gordon.* Clerk, *Kirkpatrick.*

N° XCVII. 25th *January* 1754.

*MARGARET ANDERSON* and *RACHEL GIBSON*

againſt

*JAMES GIBSON* and his Curators.

*JAMES GIBSON* having ſucceeded as heir to his grand uncle *John Jack*, *James Gibſon*'s mother *Margaret Anderſon*, and his ſiſter *Rachel Gibſon*, brought a proceſs againſt him and his curators for an aliment.

The defender admitted that an aliment was due to his mother; but contended: That his ſiſter, who was paſt 21 years of age, had no legal claim againſt him for an aliment.

*Pleaded* for *Rachel Gibſon:* That, by the civil law, perſons who are able, are bound to aliment their brothers and ſiſters who are in want; *L.* 1. § 2. *ff. De tutel. et ration. diſtra. L.* 13. § *ult. ff. De admin. tut.* and *Voet. ab tit. De agn. et alend. liberis*: And as this obligation is founded on the law of nature, and proceeds *ex æquitate et charitate ſanguinis* betwixt brothers and ſiſters, it ought to take place with us; and ſo it has frequently been decided, particularly 10th *November* 1671, *Haſty contra Haſty*; and 23d *July* 1715, children of *Knapperny* againſt their elder brother.

*Anſwered* for *James Gibſon* and his curators: That altho' he would be very ready to relieve his ſiſter when in need, yet he is under no legal obligation to aliment her. The texts cited from the civil law, only permit tutors and curators to make reaſonable depurſements out of the pupils or minors eſtates for the education and maintenance of unprovided brothers and ſiſters, but by no means make it neceſſary for the minor or his curators to make ſuch depurſements. And all the deciſions of this Court, whereby a brother has been found obliged to aliment his brothers and ſiſters, were upon this foundation, that he, as heir to his father, was liable to the ſame obligations to which his father was liable; and therefore to aliment the children of his father. And even in ſuch caſes the obligation reached no farther than to aliment them during their pupillarity, or, at fartheſt, minority. But, in the preſent caſe, the defender does not repreſent his father, but ſucceeded to his grand uncle, who was under no obligation to aliment the purſuer *Rachel Gibſon*, and ſhe is paſt the years of minority.

" The Lords found, that *Rachel Gibſon* was not entitled to an ali-
" ment." B

Act. *Dav. Dalrymple.* Alt. *Dav. Rae.* Clerk, *Kirkpatrick.*

N° XCVIII. 14th *February* 1754.

## *SYLVESTER DONALDSON*
against
## *WILLIAM FULTON.*

*FULTON* put out his ſon apprentice to *Donaldſon* ſhoemaker. The ſum to be given with the apprentice was not inſerted in the indenture; but, in lieu thereof, *Fulton* accepted a bill for *L.* 3 : 3. *Sterl.* payable to *Donaldſon*. *Donaldſon* having charged on this bill, *Fulton* ſuſpended; and the caſe was reported by Mr. *Alexander Boſwell* of *Auchinleck* Lord Probationer.

*Pleaded* for *Fulton* the ſuſpender : No action can ly on this bill; for that the indenture, on account whereof it was granted, is itſelf void. The act *oct. Ann. Cap.* 8. provides, that the full ſum of money received, or *in anywiſe directly or indirectly given* with every apprentice, be inſerted in the indenture; and in default thereof that the indenture be void, and the apprentice incapable of acquiring his freedom, or of exerciſing his intended profeſſion. Now, in the preſent caſe, the ſum given with the apprentice was not inſerted in the indenture, but a diſtinct ſecurity taken for it ; the indenture is therefore void by the ſtatute ; and the bill, as it cannot be ſeparated from its cauſe, muſt be alſo void.

*Pleaded* for *Donaldſon* the charger : When the ſum given with the apprentice is not inſerted, the act *oct. Ann. Cap.* 8. voids the indenture, but not any ſeparate obligation for ſuch ſum: And therefore, altho' the indenture ſhould be found void, the bill muſt ſubſiſt. The cauſe of granting the bill was not that the apprentice might be free of a corporation, but that he might be taught the trade of a ſhoemaker ; and this cauſe is not removed by the voiding of the indenture.

" The Lords ſuſtained the reaſons of ſuſpenſion." D

Act. *J. Grant.* Alt. *Wedderburn.* Reporter, *Auchinleck.*

N° XCIX. 15th *February* 1754.

## VISCOUNT of *ARBUTHNOT* and others
against
## The JUSTICES of the PEACE for the County of *Kincardine.*

THE Juſtices of the Peace for the county of *Kincardine* made an order, that the ſix days work for the high-ways, of all the tenants, cottars, and other labouring men within the county, ſhould be applied, in the firſt place, for the repairing of one high-way ; and they permitted thoſe who lived at a diſtance from that high-way, to compound at a rate below the legal compoſition.

The Viſcount of *Arbuthnot* and others preſented a bill of ſuſpenſion of this order, and *pleaded :* That the Juſtices had therein exceeded the powers given them by law ; for that the act 16. *Parl.* 2. *Seſſ.* 1. *Charl.* II. ordains the Juſtices " To divide the pariſhes of their bounds, as they lie moſt

" eweſt

" eweſt to the highways to be repaired, and as they may have the moſt e-
" qual burden;" and the meaning of this regulation is, that the highways be repaired by the inhabitants of the neareſt pariſhes, and by them only; not that all who are bound to perform the ſix days work may be called out from one extremity of the county to the other. Such extenſion of the law would, in the county of *Kincardine*, prove a heavy burden; and in more extenſive counties, an intolerable grievance. And if the tenants and others be not obliged in law to perform the ſix days work, on diſtant roads, they cannot, in caſe of failure, be obliged to compound.

*Anſwered* for the Juſtices of the Peace: The order of the Juſtices may be ſupported both from the words and the ſpirit of the laws reſpecting the reparation of highways; for that the act 9. *Parl.* 2. *Seſſ.* 2. *Charl.* II. permits the Juſtices to accept of a certain compoſition in lieu of the ſix days work, " Where the ways lie at *a great diſtance* from thoſe who are " liable to repair the ſame;" which words imply, that the perſons bound by law to work at the reparation of the highways, may be called to ſuch work from any diſtance whatever. And this is further explained by the act 5. *Georg.* I. *cap.* 29. which, by providing that the tenants, *&c.* be called out on ſuch days and " at ſuch places as the Juſtices ſhall appoint," lodges a diſcretionary power with the Juſtices: this power has, in the preſent caſe, been exerciſed with moderation; and perſons reſiding at a diſtance have been allowed to compound at a rate even below that which is eſtabliſhed by ſtatute. Further, the purpoſe of the acts aforeſaid was, that the highways throughout the kingdom might be repaired in the manner leaſt grievous to the people: now, by this, the legiſlature could not mean that the highways ſhould be repaired by calling out the tenants, *&c.* for the repairing of the roads within their reſpective pariſhes; for that ſuch method is inequal, expenſive, and unſucceſsful: it is inequal, for that in order to repair the highways within one pariſh, the country ſervices may be more than ſufficient, within another, leſs; it is expenſive, as many overſeers muſt be paid when various roads are repaired at once; and how unſucceſsful it is, the experience of all *Scotland* has demonſtrated: on the other hand, if the country ſervices be applied for the reparation of the highways ſucceſſively, their uſe may, at length, be in a great meaſure ſuperſeded, and the people relieved of this burden.

" The Lords refuſed the bill of ſuſpenſion." D

For the ſuſpenders, *Brown*, *Lockhart*. Alt. *J. Grant*. *R. Dundas*.

N° C. 20th *February* 1754.

## *ANDREW LOOKUP*

againſt

*JOHN CROMBIE* and the Creditors of *ARCHIBALD CROMBIE*.

*ARCHIBALD CROMBIE* was debtor to *Robert Richardſon* by two bills, the one dated 4th *June* 1721, payable 10th *February* 1722; and the other dated 15th *June* 1724, payable on demand.

*John Crombie*, nephew and apparent heir to the ſaid *Archibald*, brought a ſale of his lands and ranking of his creditors in terms of the act of *Parl.* 1695.

In

In this proceſs, *Andrew Lookup*, who had right to the above bills by indorſations, compeared and craved to be ranked for the ſums thereby due.

It was objected by *John Crombie* and the creditors, that the bills having lien over about 30 years, without any legal demand being made, no action could now be ſuſtained upon them.

*Anſwered* for *Andrew Lookup*: That although bills loſe their extraordinary privileges, in a very ſhort time, yet they do not, by the law of *Scotland*, ceaſe to be probative writings, or preſcribe in leſs than 40 years; that they do not preſcribe in 20 years, appears from the 9th act *Parl.* 1969, introducing the vicennial preſcription of certain writs mentioned in the act, of which bills are none; and Sir *George Mackenzie*, in his obſervations on that act, ſays, " That the Parliament refuſed to limit bills of exchange " to this preſcription." And if ſo, they can fall under no ſhorter preſcription, and there is no other period of preſcription known in our law till that of 40 years; and to deny action on them becauſe of the lapſe of time, is, in other words, to find that they are preſcribed. In the preſent caſe, the reaſon of their lying ſo long over, was the bad circumſtances of the original debtor and his heirs, who put off the creditors with promiſes of payment.

*Replied* for *John Crombie* and the creditors: That bills were introduced ſolely for the ſake of commerce, and not to remain as permanent ſecurities; that, by the law of *England* and of moſt trading nations, they are limited to a very ſhort period, and ought to be ſo with us alſo, being introduced in imitation of other trading nations; and to ſuſtain action on them after 30 years, which have run ſince their term of payment, would be opening a door to forgery, as bills are executed with ſo few ſolemnities, that in moſt caſes, it would be impoſſible to diſcover the falſhood. And Lord *Stairs*, *L.* 4. *tit.* 42. § 6. obſerves, " That bills kept up for any conſider-" able time are not probative."

" The Lords found that no action could be ſuſtained on the bills." B

For *Andrew Lookup*, *Bruce*. For *Jo. Crombie*, *Geo. Pringle*. Clerk, *Pringle*.

N° CI. 26th *February* 1754.

*DOROTHEA PRIMROSE* and Siſters

againſt

His Majeſty's ADVOCATE.

BY contract of marriage dated 1724, between Sir *Archibald Primroſe* and Lady *Mary* his wife, the former is bound to reſign his lands, *&c.* to himſelf and heirs-male of that marriage, which failing, to the heirs-male of any ſubſequent marriage; which failing, to his other heirs of tailzie: with the following proviſo in favour of daughters. " And farther, " in caſe there be no heir-male, but allenarly a daughter or daughters of " this marriage, *&c.* and that they ſhall be debarred from ſucceeding to " the eſtate by Sir *Archibald*'s other heirs-male; then and in that caſe, " Sir *Archibald* binds him and his heirs-male and ſucceſſors in the foreſaid " lands, to make payment to the daughter or daughters, *&c. viz.* if one,

" 24,000

" 24,000 merks; if two or more, 36,000 merks, *&c.* and that at the " firſt term of *Whitſunday* or *Martinmas* after his deceaſe, *&c.* with an- " nualrent thereafter."

Upon the 15th *November* 1746, Sir *Archibald* ſuffered death for high treaſon, leaving iſſue one infant-ſon and ſeven daughters. In *January* 1747, his ſon died. The daughters entered a claim for the 36,000 merks.

*Objected* for the Crown: That ſuppoſing Sir *Archibald* had died unattainted, the exiſtence of the heir-male diſappointed the purification of the condition, upon which depended the proviſion of the daughters.

*Anſwered* for the daughters: That as it is in reality the ſame thing to all the parties concerned, whether the ſons die before or immediately after the father, it cannot be ſuppoſed that the parents intended the daughters a proviſion in the one caſe and none in the other; and in this caſe the heir-male, an infant, died 2 months after his father.

But, 2*do*, whatever might be the law, where the father's deceaſe is the term under the conſideration of parties, yet that was not the caſe here; for the term under the conſideration of parties for regulating the daughters proviſions, is not the father's deceaſe, but the firſt *Whitſunday* or *Martinmas* thereafter. For ſuppoſe two daughters had outlived the father, and one of them had died before the firſt *Martinmas* or *Whitſunday* after his death, it would have been ſuppoſed that only one daughter had exiſted of the marriage; and 24,000 merks, the proviſion for one alone, would have taken place. This being the caſe, although the ſon out-lived the father, yet as he died before the term which regulated the proviſions to the daughters, their proviſions were certainly due. See the caſe of the Earl of *Dumfermling contra Callendar*, 27th *June* 1676.

*Replied* for the Crown: That however hard it may be, yet ſuch is the principle of our law, that the condition *ſi ſine liberis* or *ſi ſine hærede maſculo*, has always been underſtood to be diſappointed by the bare exiſtence of ſuch children or heir-male, after the father's deceaſe. And there is no ſpeciality in this caſe to exempt it from the general rule. For though it is very true, that the firſt term of *Whitſunday* or *Martinmas* after the father's deceaſe was under conſideration of the parties; yet that was only for regulating the extent of the proviſions for the daughters, and from whence that proviſion was to be payable and to bear intereſt. But the non-exiſtence of an heir-male at the father's deceaſe was the condition of the debt itſelf. See the caſes of *Somervel contra Tennant*, 25th *July* 1688, Lord *Royſton* and *Frazerdale contra Halyburton*, 16th *February* 1715, *Drummond* of *Comry* 17th *June* 1638; ſee alſo the *Dict. vol.* 1, *p.* 187 & 188. There was another point argued in this caſe, *viz.* the effect of the attainder againſt this bond, ſuppoſing the condition to have been purified: and the caſe of *Margaret Oliphant* 23d *July* 1752 was referred to; but as the Court were unanimous upon the firſt point, this other was not determined.

" The Lords diſmiſſed the claim."

s

Act. *James Ferguſon*, &c. Alt. *Alexander Home*, &c, Clerk, *Pringle*.

N° CII. 28th *February* 1754

*ANDREW GLASS* and others

againſt

The MAGISTRATES of *St Andrews*.

THE annual election of the magiſtrates and council of the burgh of St. *Andrews* was begun upon the 26th *September*, and ended on the 8th *October* 1753. Three of the counſellors choſen declining to accept, a council was called upon the 19th of the ſame *October*, when three other perſons were elected in their places.

Upon the 18th *December* following, a petition and complaint was exhibited by *Andrew Glaſs* one of the Bailies and others, on 16. *Geo.* II. *cap.* 11. for annulling the election of theſe three new counſellors, and for coſts.

*Objected* to the competency of this complaint: 1*mo*, That the act of Parliament doth not authorize application to the Court of Seſſion by ſummary complaint, except againſt the proceedings at the annual election, or previous thereto; and that the proceedings of the magiſtrates at an ordinary meeting, ſuch as this was, can be reverſed by way of reduction only. 2*do*, That ſuppoſing the election complained of, to be within the act, yet the ſummary complaint ought in terms of the act to have been exhibited *within two callendar months after the annual elections of the magiſtrates and counſellors*. Now this complaint though within two months of the election complained of, was more than two months after the annual elections.

The Court was of opinion that the annual elections only could be ſummarily complained of upon the ſtatute.

" The Lords found the complaint not competent, and therefore diſ-
" miſſed the ſame."

s

Act. *Ja. Ferguſon.* Alt. *Ro. Craigie.* Clerk, *Pringle.*

N° CIII. 28th *February* 1754.

*THOMAS DUNCAN*

againſt

His Majeſty's ADVOCATE.

*DUNCAN* entered a claim upon the forfeited eſtate of Sir *James Kinloch-Nevoy* for *L.* 100 *Scots*, contained in a bill accepted by Sir *James*, dated 28th *Auguſt* 1745. He offered a proof by witneſſes that this debt was not a new contraction of the date of the bill, but was the balance of an old debt, contracted many years before the 24th *June* 1745, the term of the veſting act 20. *Geo.* II. *cap.* 41.

*Objected* for his Majeſty's Advocate: 1*mo*, That the claim was not relevant, becauſe, ſuppoſing the balance of an old debt was the cauſe of granting the bill, yet the bill was an innovation of the debt; and the date of it being poſterior to the term when the eſtate was legally veſted in his Majeſty, the eſtate could not be burdened with it. And as an argument analogous,

logous, it was urged, that a diſpoſition falling under the bankrupt act 1696, or under an inhibition, could not be ſupported upon this ground that it was a *ſurrogatum* to an old debt. In a competition of infeftments a creditor under a ſecond infeftment could not plead preference to a firſt infeftment, becauſe his infeftment had come in place of one which had been prior to the firſt.

*Anſwered* for the claimant: That, in terms of the veſting act, this was a debt *which was binding on the forfeiting perſon, and might have affected his eſtate before the reſpective days and terms whereon the ſame was veſted in his Majeſty.* That in the claim of Mr. *John Macfarlane* upon the eſtate of *Lovat* 12th *July* 1751, the objection here made had been repelled by one of their Lordſhips as an Ordinary, after having adviſed with their Lordſhips, and uniformly by their Lordſhips as Ordinaries, in many other caſes. That the caſes of the bankrupt act, of inhibitions and infeftments, were not paralel, becauſe, in all theſe caſes, the law is expreſs, and in the two laſt the record is held to be notice of the circumſtances of an eſtate, and they who give truſt after ſuch notice, *ſibi imputent.*

*Objected 2do* for his Majeſty's Advocate: That a proof by witneſſes was not competent in this caſe, becauſe thereby a door would be opened to fraud; for that perſons intending to riſe in rebellion, would always, when they granted bonds, take care to ſay before witneſſes, that theſe bonds were for prior debts.

*Anſwered* for the claimant: That the veſting act has not prohibited a proof by witneſſes. Our law admits of ſuch proof in ſimilar caſes: In reductions of writs on the head of death-bed, where the defence is, that the writ is for onerous cauſes; Lord *Stair* ſays expreſsly, " That witneſ-" ſes are ſuſtained to prove the onerous cauſes in the writ," *L.* 3. *tit.* 4. § 30; Parole evidence will be allowed to prove the date and delivery of holograph deeds; In reductions upon the act 1621, the onerous cauſes of deeds may be proved by the like evidence. See Lord *Stair L.* 1. *tit.* 9. *p.* 84.

" The Lords found the proof by witneſſes was competent, and ſuſtain-" ed the claim. B

Act. *Scrymzeour.* Alt. *Alex. Home & And. Pringle.* Clerk, *Murray.*

N° CIV. 6th *March* 1754.

Earl of *MARCH*

againſt

*CHARLES DOWIE.*

IN 1745, the Counteſs of *March* ſet the mill of *Kings-Cramond* and certain lands, to *Charles Dowie* for the ſpace of one year, and his entry was at the term of *Martinmaſs.*

*Dowie* continued to poſſeſs for ſeveral years by tacit relocation; and after the death of the Counteſs, her ſon the Earl, in *February* 1753, not knowing the term of *Dowie*'s entry, warned him to remove from his poſſeſſion againſt *Whitſunday* 1753.

The Earl brought a proceſs for removing, before the Sheriff of *Edinburgh*, who decerned *Dowie* to remove from the arable land at the ſeparation

tion of the crop from the ground, and from the houſes at *Martinmaſs* 1753.

*Charles Dowie* ſuſpended and *pleaded:* That the warning was void and null, in regard he was warned to remove at a term at which he could not be obliged to remove; and therefore no decreet of removing could be pronounced on ſuch warning.

*Anſwered* for the Earl: That by the act of Parliament 1555, all warnings muſt be executed forty days before *Whitſunday*, at whatever term the tenant entered, and therefore the warning was properly executed forty days before *Whitſunday*; and altho' he was warned to remove at *Whitſunday*, which was not the term of his entry, yet the only conſequence of that ought to be, that the removing behoved to be ſuperſeded until *Martinmaſs* 1753, which the Sheriff had done.

" The Lords ſuſtained the objection to the warning; but of conſent " found the letters orderly proceeded for the ſuſpender's removing at " *Martinmaſs* 1754. B

For the charger, *Brown.* Alt. *Jo. Grant.* Clerk, *Kirkpatrick.*

N° CIV. 6th *March* 1754.

*ARCHIBALD CAMPBELL* younger of *Succoth*

againſt

Captain *JOHN STIRLING* of *Herbertſhire.*

AT the *Michaelmaſs* meeting 1753, *Archibald Campbell* claimed to be inrolled amongſt the freeholders of *Stirling-ſhire*, and produced as his titles a charter under the great Seal, dated 27th *July* 1752 in favour of himſelf in liferent, and his eldeſt ſon in fee of certain parts of the barony of *Herbertſhire*, and ſeiſin thereon in *September* 1752, redeemable and under reverſion as mentioned in a contract of wadſet dated 22d *March* 1735, betwixt *William Stirling* of *Herbertſhire*, and Captain *Charles Campbell* the claimants author.

It was *objected* by Captain *John Stirling*: 1ſt, That the wadſet was an improper one, and therefore did not entitle to a vote: 2dly, That the claimant was not in poſſeſſion of the whole of the wadſet lands: and 3dly, That there was no legal evidence of the valuation of *Thornie-Hill*, part of the wadſet lands. And the freeholders ſuſtained the objections.

*Archibald Campbell* complained to the Court of Seſſion: and as the firſt objection is founded on the conception of the wadſet, it is neceſſary to obſerve that *William Stirling* the reverſer had only right to the ſuperiority of the greateſt part of the lands given in wadſet, whereof the feu-duties amounted to *L.* 22 : 6 : 10 *Scots*, and to the property of a ſmall part whereof the real rent was *L.* 27 *Scots*; and theſe two ſums nearly correſponded to the annualrent of *L.* 82 *Sterling* the ſum given for the wadſet. And the contract warrants the yearly feu-duties and rents to amount, at the date of the contract, to *L.* 49 : 6 : 10 *Scots*; and alſo warrants the lands " from ſchoolmaſters ſalaries, and future augmentations of miniſters ſti- " pends, and all other burdens and impoſitions whatever impoſed, or to " be impoſed on the ſaid lands, and generally from all perils, dangers, inconveniencies,

" inconveniencies, and impediments whatſoever, as well named as not " named, bygone, preſent, or to come, at all hands, and againſt all " deadly." Then it excepts from the warrandice the ſeveral feu-rights granted to the vaſſals, and goes on to except, " As alſo the feu-right grant- " ed, at leaſt claimed, by the family of Lord *Forreſter* of the ſaid lands of " *Gunnerſhaw*, to which the ſaid *William Stirling* himſelf now claims right; " which feu-right is expreſsly reſerved to the ſaid *William Stirling*, or thoſe " having right thereto, under the burden always of 17 *s.* : 4 *d. Scots* of " yearly feu-duty furth of the ſame in favour of the ſaid Captain *Charles* " *Campbell*; and under which burden of the ſaid yearly feu-duty, any " feu-rights hereafter to be granted ſhall be expreſsly taken."

The contract contains alſo a clauſe relating to the caſualties of ſuperiority, whereby it is provided: " That whereas, beſides the annual profits " and feu-duties of the foreſaid lands wadſet to Captain *Charles Campbell*, " it may likeways happen, that, during the not-redemption, certain ſums " of money will become due and payable to the ſaid Captain *Campbell*, up- " on his receiving heirs or ſingular ſucceſſors on the ſaid feu-rights, or by " the ſaid feus remaining in non-entry: therefore Captain *Campbell* ob- " liges himſelf his heirs and ſucceſſors, perſonally to ſubmit to two per- " ſons to be mutually choſen, what ſhall be paid to *William Stirling*, or " his heirs for the ſaid caſualties of ſuperiority; and that either when " the ſaid caſualties fall due, or at the redemption of the wadſet, in the " option of the ſaid *William Stirling*. And if Captain *Campbell*, or his " foreſaids, ſhall refuſe or fail to ſubmit, or to pay what is awarded by " the arbiters, it ſhall be lawful to the ſaid *William Stirling* and his fore- " ſaids, *To redeem* the ſaid lands and ſuperiorities from the ſaid Captain " *Campbell* and his foreſaids, at any term after ſuch refuſal or failure to ſub- " mit or pay, by payment or conſignation of the foreſaid ſum of *L.* 82 " *Sterling*, *With deduction* therefrom of what compoſitions ſhall have be- " come due by law for the entry of ſuch vaſſals; and that upon ſuch pay- " ment or conſignation, the wadſet right ſhall become *eo ipſo* void and ex- " tinct without any proceſs or declarator."

It was *objected* for Captain *Stirling*: That this wadſet was evidently an improper one, as the wadſetter was ſecured in the annualrent of his money, and could not poſſibly receive any more; for the lands are warranted to be worth the annualrent of the wadſet-ſum at the wadſetters entry: and as the ſubject given in wadſet was chiefly the feu-duties of lands, there could be no hazard of their decreaſing in value, or becoming ineffectual: and farther, there is an anxious clauſe of warrandice ſecuring the wadſetter from all *burdens and impoſitions whatever*, *and from all other perils*, *dangers*, *burdens*, *and inconveniencies*, *&c. paſt*, *preſent*, *or to come*; and as he thereby had ſecurity for the annualrent of his money, ſo he could have no more, ſeeing he was accountable for the caſualties of ſuperiority; and if he did not make payment of the ſums of money thence ariſing, theſe ſums imputed towards extinction of the wadſet-ſum: ſo that this wadſet was only a ſecurity for money, and therefore improper.

Lord *Stair*, *tit. Wadjets.* § 11. obſerves, " If there be a proviſion to " compt for the profits of the land, or to hold the lands at ſuch a rent, it " is an improper wadſet." Such is the caſe here: for the caſualties of ſuperiority are part of the profits of the lands, and it is inconſiſtent with the nature of a proper wadſet to account for theſe caſualties; for that a proper wadſetter has the *plenum dominium* of the lands during the not-redem-

ption, and therefore muſt have right to the caſualties which fall due before the redemption.

2*dly*, It was further *objected* by Captain *Stirling* : That neither the property nor ſuperiority of the lands of *Gunnerſhaw* were conveyed to the wadſetter, but only a right to uplift 17 *s.* : 4 *d. Scots* yearly out of theſe lands, as appears from the clauſe relative thereto. And if the complainer contend, that the family of Lord *Forreſter* had a feu-right to theſe lands holding of *Herbertſhire*, he muſt at leaſt ſhow that the feu-duty payable to the ſuperior was preciſely 17 *s.* : 4 *d. Scots.*

3*dly*, Neither had the complainer or his author ever been in poſſeſſion of the ſaid lands of *Gunnerſhaw*, or of the ſaid 17 *s* : 4 *d.* upliftable furth thereof; for that the ſaid *William Stirling* did, ſoon after the date of the contract of wadſet, diſpone theſe lands to Lady *Forreſter* to be held of the Crown, without any mention being made of the ſaid yearly burden or annuity of 17 *s.* : 4 *d*: the Lady *Forreſter* conveyed them to *Forreſter* of *Denoven*, who is now in poſſeſſion of them by charter and ſeiſin from the Crown ; and this annuity has never been demanded from him. And, the lands of *Gunnerſhaw* being deduced, the valuation of the complainer's other lands will not amount to *L.* 400 *Scots.*

4*thly*, It was *objected*: That there was no legal evidence of the valuation of the half of the lands of *Thornie-Hill* (part of the wadſet-lands), they being originally valued *in cumulo* with other lands, and their valuation only disjoined by a private meeting of commiſſioners in 1740.

It was *anſwered* for *Archibald Campbell:* That feu-duties are no leſs the ſubjects of proper wadſets than rents of lands are. And in the preſent caſe, part of the ſubject given in wadſet is the rents of lands, which may riſe or fall ; and the whole of the wadſet is proper, as the wadſetter takes the rents and feu-duties for his annualrent, accounts not for any part of them if they exceed it, nor has any claim for the difference, if they fall ſhort of it. And where ſuch is the contract, the wadſet is proper, as appears from *act* 62. *Parl.* 1661. § *ult.* The clauſe warranting the rents to be ſo much at the time of the wadſetter's entry, is uſual, and renders not the right an improper wadſet, as the wadſetter takes his hazard of the future riſing or falling of the fruits, as well as of the failure of tenants, *&c.* the other part of the clauſe of warrandice is no more than words of ſtile uſed both in wadſets and in abſolute diſpoſitions ; and the warranting againſt augmentations of ſtipend was reaſonable, becauſe ſuch augmentations are really an eviction of part of the tithes.

Neither can it alter the nature of this wadſet that the wadſetter was not to have right to the caſualties of ſuperiority ; for theſe are not the fruits of the lands, nor were they proper ſubjects to be relied on for the payment of the annualrent of the money, as they might not fall due for many years: the wadſetter relied on the rents and feu-duties for payment of his annualrent, and, as he gave no conſideration for the chance of caſualties, it was reaſonable that he ſhould account for theſe when they fell due ; but this did not make him ceaſe to be proprietor of the lands: in like manner, a ſuperior may agree to gift or diſcharge the caſualties, and yet he will remain ſuperior, and be intitled to vote in right of his ſuperiority.

With reſpect to the lands of *Gunnerſhaw*, it was *anſwered:* That formerly *Herbertſhire* had only right to the ſuperiority of theſe lands, and the property of them belonged to Lord *Forreſter*; that before the date of the contract

tract of wadſet, *Herbertſhire* had acquired right to the property, by purchaſing appriſings which had been deduced againſt Lord *Forreſter*: and both rights being thereby in the perſon of *Herbertſhire*, he, by the contract, only conveyed the right of ſuperiority to the wadſetter, and retained the property.

The complainer is as much in poſſeſſion of theſe lands as the nature of his right will admit; for that by the clauſe in the contract of wadſet, reſerving *William Stirling*'s right "under the burden always of 17 s. 4 d. "*Scots* of yearly feu-duty furth of the ſame," *William Stirling* acknowledged himſelf to be Captain *Campbell*'s vaſſal in theſe lands; and the poſſeſſion of the vaſſal is always held to be the poſſeſſion of the ſuperior; and this poſſeſſion could not be inverted by *William Stirling*'s having afterwards diſponed theſe lands to be held of the crown, no more than a tenant could invert his maſter's poſſeſſion by taking a tack from another: And Mr. *Campbell*'s infeftment being prior to any infeftment taken by Lady *Forreſter*, or *Forreſter* of *Denoven*, on a charter from the crown, muſt be preferable.

It is of no conſequence, whether or not the complainer or his author have been in uſe to levy the feu-duty of 17 s. 4 d. for it often happens, that when feu-duties are ſmall, ſuperiors do not demand them for ſeveral years, until the ſum due becomes conſiderable: And in blanch-holdings, the blanch-duties are never demanded; but this impairs not the right of ſuperiority. And the complainer, ſince his purchaſe, granted a factory for uplifting this feu-duty and the other feu-duties and rents of the wadſet-lands; and, in *December* laſt, obtained a poinding of the ground for the feu-duties.

To the objection that the valuation of the half of *Thorniehill* was not properly ſeparated from the valuation of the other lands, it was *anſwered:* That altho' the disjunction in 1740 was made by a private meeting, yet it was valid; for that a legal meeting of Commiſſioners of Supply held in 1753, in their proceedings refer to the diviſion made by the ſaid private meeting; and thereby homologated that diviſion.

"The Lords found, that the complainer's right was a proper wadſet, "and the lands therein mentioned properly conveyed; as well thoſe "whereof the feu-rights of the vaſſals were excepted, as thoſe "whereof the property was conveyed: and found, that the lands "of *Thorniehill* were regularly divided, and the valuation of the half "thereof made in the year 1740, was confirmed by the reference "made in the ſubſequent diviſion by the meeting of the Commiſ-"ſioners of Supply in the year 1753: and found his poſſeſſion of the "lands of *Gunnerſhaw* ſufficiently inſtructed, and therefore repelled "the objections to the complainer's title, and ordained him to be ad-"ded to the roll." *Affirmed.* B

Act. *Lockhart, Pringle, & Grant.* Alt. *Ferguſon, Macdoual, Dundas, & Bruce.* Clerk, *Forbes.*

## N° CVI.

N° CVI. 8th *March* 1754.

Heritors of the Pariſh of *TAIN*

againſt

*MARGARET MONRO.*

THE patronage of the church of *Tain*, fell to the Crown by the attainder of the Earl of *Cromarty*. The Barons of Exchequer, in right of his Majeſty, granted certain vacant ſtipends of this pariſh, to *Margaret Monro* widow of the laſt incumbent.

Some of the heritors having been charged by her for payment of theſe ſtipends, preſented a bill of ſuſpenſion and *pleaded:* That the gift to the charger, is an illegal application of the vacant ſtipends, which, by law, are appropriated for *pious uſes within the pariſh.* The act 18. *Parl.* 1685 indeed declares that this *is not to be extended to the vacancies of theſe churches whereof the King's Majeſty is patron*; but this exception relates to patronages then acquired, not to ſuch as might afterwards be acquired, by the Crown. In this caſe, the King has, ſince the act 1685, come in right of the Earl of *Cromarty*; and every objection, which would have been good againſt a gift obtained from the former patron, muſt be good againſt a gift obtained from the King.

*Anſwered* for the charger: The patron had formerly, by common law, the diſpoſal of the vacant ſtipends. The act 18. *Parl.* 1685, ordained the vacant ſtipends to be applied for pious uſes within the pariſh: But there is an exception in caſes where the King is patron; that is, the King was to remain in the condition wherein all patrons were before that act, and have the incontroulable diſpoſal of vacant ſtipends: This is a perſonal privilege in favour of the King, and muſt therefore be extended to patronages acquired ſince the act 1685, as well as to theſe which were in the Crown at that time.

"The Lords refuſed the bill of ſuſpenſion." D

For the ſuſpenders, *Lockhart*. Alt. Sir *David Dalrymple*.

N° CVII. 9th *March* 1754.

Sir *LEWIS MACKENZIE* of *Scatwell*

againſt

His Majeſty's ADVOCATE.

IN the 1705, *George* Earl of *Cromarty* became bound to pay 2300 merks to *Kenneth Mackenzie* of *Scatwell*. In the 1723, *Scatwell* obtained decreet adjudging the eſtate of *Cromarty*, for payment of the principal and intereſt of the ſum aforeſaid, accumulated from the date of the adjudication. The late Earl of *Cromarty*, heir of the original debtor, was attainted, and his eſtate veſted in the King. Sir *Lewis Mackenzie* of *Scatwell*, having right to the adjudication aforeſaid, entered his claim for payment of the accumulated ſum and intereſt on it from the date of the adjudication.

His

His Majeſty's Advocate *objected:* That, by the act 20. *Georg.* II. *cap.* 41. it is provided, " That no decree, in favour of any claimant, or debenture, or certificate, to be iſſued thereupon, ſhall be made for any ſum " or ſums, on account of penalties, for failure of payment at the day it " became due, or for any other penalties whatſoever." And he *contended*, That the accumulating of capital and intereſt may not be ſtipulated in an original obligation; but is indeed a legal penalty inflicted for the non-payment of the capital and intereſt; and that therefore the claim, in ſo far as it is for ſuch penalty, ought to be diſmiſſed.

*Anſwered* for the claimant: He who fails to make payment of the intereſt of money borrowed, ought, by a bond of corroboration, to convert both capital and intereſt into one capital ſum bearing intereſt; this, on his neglect, the law effectuates by a decreet of adjudication. And neither can the former accumulation, which is by the deed of the party, nor the latter, which is from the operation of the law, be, in any propriety of ſpeech, termed *a penalty:* as a bond of corroboration would not, on the forfeiture of the granter, be reſtricted; ſo neither ought an adjudication to be reſtricted to the original capital, and ſimple intereſt.

" The Lords ſuſtained the claim." Reversed; But on a very distinct Ground from that ſtated in the Deciſion. D

Act. *Lockhart.* Alt. *The Crown's Lawyers.* Clerk *Juſtice.*

N° CVIII. 10th *March* 1754.

## *GEORGE BUCHANAN*

againſt

## *JAMES TOWART.*

*GEORGE BUCHANAN*, proprietor of the woods of *Auchindinnan*, preferred a complaint to the Juſtices of Peace of *Dumbartonſhire*, on the 18th act *anno* 1. *Geo.* I. intitled, *An act to encourage the planting of Timber-trees*, &c. *and for the better preſervation of the ſame*, againſt *James Towart*, for cutting and ſtealing certain trees from the woods of *Auchindinnan.*

The Juſtices ordained *Towart* to be four months impriſoned, and four times whipped, in terms of the ſtatute. He offered a bill of ſuſpenſion and liberation, which was taken to report to the whole Lords.

The *objection* made to the paſſing of the bill was, That, as in the ſtatute in queſtion, *the Juſtices of Peace are authoriſed to hear, and finally determine, and adjudge* all offences againſt the ſame; the determination of the Juſtices was here final; and the Court of Seſſion could not review their ſentence.

To which it was *anſwered* for *Towart:* In the language of ſtatutes, *finally determine* does not import that the determination ſhall be final:

For, where-ever a ſtatute intends the determination of a court to be final, it uſes an expreſſion of its intention much more exact and copious than is contained in theſe words, *finally determine:*

Or, where it means to give that import to theſe words, *finally determine*, it continually attends them with the addition of many others explaining its intention.

*Cay*, in abridging the ſtatute in queſtion, leaves out the word *finally*, as a mere expletive; underſtanding that *finally determine* means nothing more than to bring the cauſe to an iſſue, ſo far as depends upon the Juſtices.

The act of the eleventh of *Henry* VI. *cap.* 6. ordaining, That no ſuit, before former Juſtices, ſhall be diſcontinued by a new commiſſion, gives a power to the new Juſtices to determine pleas, which were before the former ones, and *the ſame pleas and proceſſes, and all that depend upon them, to hear and finally determine.* If *finally determine* ſignified that the determination ſhould be final; then, by this ſtatute of *Henry* VI. the determination of the Juſtices would have been final in all queſtions coming before them, which is not true.

In the act 19th *An.* 20. *Geo.* II. intitled, *An act for the adjuſting and more eaſy recovery of the wages of certain ſeamen*, the Juſtices have a power finally to determine the diſputes therein provided for; notwithſtanding which, many ſentences of Juſtices on ſuch diſputes have, ſince that ſtatute, come under the review of the Court of Seſſion.

The ſtatute in queſtion gives no appeal from the ſentences of the Juſtices to thoſe of the quarter-ſeſſions; but, when a ſtatute, relating to a crime, intends to give the final determination to the Juſtices of Peace, it conſtantly takes care to give an appeal to the quarter-ſeſſions, for the greater ſafety of the ſubject.

" The Lords ordained the bill to be paſſed." J. D.

Act. *Lockhart.* Alt. *Boſwel, & J. Dalrymple.* Reporter *Murkle.*

N° CIX. 1ſt *July* 1754.

Creditors of *JAMES STRACHAN*

againſt

*LUDOVIC STRACHAN.*

*JAMES STRACHAN* of *Dalhackie* became bound, in a poſt-nuptial contract of marriage, to pay certain ſums of money to the children, born or to be born of that marriage; the term of payment was declared to be at the firſt term after the deceaſe of himſelf and of his wife.

In a competition between *Ludovic Strachan*, the only child of the marriage, and the creditors of *James Strachan*, it was *objected* for the creditors, That, with regard to the obligations in the contract aforeſaid, *Ludovic Strachan* was to be conſidered as an heir of proviſion only; and therefore could not compete with the onerous creditors of his father.

*Pleaded* for *Ludovic Strachan:* It is the duty of a father to provide for his children, ſuch proviſions are onerous, and conſtitute them creditors to their father; as he who is ſolvent may become bound to ſtrangers, ſo alſo may he to his own children; as he may make the exiſtence and extent of his obligation to ſtrangers depend on ſome uncertain event, ſo alſo may he, in his proviſions to his own family. Thus, it was decided, 24th *January* 1724, in the caſe, *Margaret Lyon* againſt the creditors of *Eaſterogie*; in that caſe, proviſions were made in favour of daughters to be born, and

and declared payable on the firſt of theſe three events, the day of their marriage, the attaining the age of eighteen, or the firſt term after the death of the father. And it was found, That a daughter, having right to ſuch proviſion, might compete with the onerous creditors of the father.

*Pleaded* for the creditors of *James Strachan:* Contracts of marriage ought, in reaſon, to conſtitute the children heirs of proviſion only; they may, nevertheleſs, be ſo framed as to render the children creditors. In this caſe, however, the children are only made heirs of proviſion; for that here a ſum of money is made payable after the death of the father; and which proves, That, during his life, there was no *jus crediti* conſtituted in favour of the children. Were this proviſion a *jus crediti*, this pendent obligation would exclude creditors from the date of the contract, which is abſurd. Proviſions, made payable to children whenever they ſhall attain a certain age, produce action for payment from that time; the children are therefore creditors in ſuch proviſions: for, had theſe proviſions ever been a right of ſucceſſion, they could not have altered their nature, and become a debt, from the term of payment.

The caſe of *Margaret Lyon* againſt the creditors of *Eaſter-ogle* is not in point; there the obligation was to pay at a term which might have happened before the death of the father; it was therefore found to be a *jus crediti*, not a deſtination to heirs: but the contrary would have been found, had the obligation been to pay at a certain term after the death of the father.

"The Lords preferred the creditors." D

For the Creditors, Sir *John Stewart.* Alt. *J. Grant.* Reporter, *Murkle.* Clerk, *Juſtice.*

N° CX. 2d *July* 1754.

## *MACDONELL*
againſt
## *MACPHERSON.*

*MACDONELL* of *Shian*, in the year 1739, was debtor in a bill to the deceas'd *Fraſer of Belnain.*

In the year 1740, *Belnain* adjudged the lands of *Shian* for that ſum, and charged the ſuperior; but no infeftment followed.

*Macdonell* of *Glengary* paid the debt for *Shian*; but, inſtead of a conveyance being given to him to the debt and adjudication, a diſcharge was given by *Belnain to Shian*; and *Shian* granted an heritable bond to *Glengary*, in which, among others, this ſum was comprehended.

In the year 1751, *Shian* ſold his eſtate to *Macpherſon* of *Killichuntly*; at the ſame time, by contract of agreement, *Killichuntly* bound himſelf to pay to *Glengary* a certain ſum, upon *Glengary* his granting to *Killichunty* a ſufficient conveyance of the ſaid debts.

*Glengary* purſued for the ſum; *Killichuntly* refuſed to pay till *Shian*'s bill to the deceas'd *Belnain*, and the adjudication, were conveyed to him, in terms of his obligation, which did not bind him till he had a conveyance of the debts.

The

The bill, and diſcharge, and adjudication had all been loſt, and *Belnain*'s ſon, not entering heir to his father, refuſed to grant a conveyance of the adjudication, leſt he ſhould involve himſelf in a paſſive title; but *Glengary* offered caution to *Killichuntly*, That the bill or adjudication ſhould not affect the eſtate; *Killichuntly* anſwered, That caution would not protect the eſtate againſt an expired legal.

The preciſe meaning of parties, as to the neceſſity of the conveyance in queſtion, was not clear from the terms of the agreement; neither was a parole-proof offered with preciſion to fix it.

*Obſerved* on the bench: That *Killichuntly* was in no danger from the expired legal, as no infeftment had followed on the adjudication, his danger too was the leſs, eſpecially after ſo long delay.

But, it being likewiſe obſerved, That the charge againſt the ſuperior might be conſidered as equal to an inhibition, and thereby render the adjudication effectual even againſt a purchaſer; the Lords took a middle courſe, and

"Ordained *Glengary* to raiſe an improbation, in name of *Killichuntly*, "againſt the adjudication in queſtion; and, in the mean time, ordained *Killichuntly* to pay the annualrents of the debt to the purſuer." J. D.

For *Glengary*, *Lockhart*, *J. Dalrymple*. For *Killichuntly*, *Macdowal*, *Hamilton*, *Gordon*. Clerk *Forbes*.

N° CXI. 9th *July* 1754.

*BLAW* of *Caſtlehill*

againſt

*ROBERT GEDDES*, and others, Juſtices of Peace.

MRS. *Blaw*, the purſuer's wife, having done diligence againſt him, upon a decreet for her ſeparate aliment, the expence of that diligence amounted to *L.* 13 : 15 *Scots*; ſhe brought action againſt him, for that ſum, before the defenders, as Juſtices of Peace in the *Culroſs* diſtrict of the ſhire of *Perth*; and, in her libel, ſhe craved not only decreet for the ſaid ſum and expences of plea, but alſo a warrant of warding, in caſe payment ſhould not be made within fifteen days after the charge.

The defences made for Mr. *Blaw* were: 1*mo*, That Mrs. *Blaw*, being cloathed with a huſband, could not purſue without his conſent. 2*do*, That the Juſtices of Peace were not competent judges in this cauſe.

"The Juſtices decerned, and granted warding in common form."

The purſuer being thereon put in jail, brought an action of wrongous impriſonment againſt the Juſtices; wherein it was inſiſted, 1*mo*, That the Juſtices of Peace have no general juriſdiction in civil debts; and, 2*do*, Tho' they had ſuch juriſdiction, yet they have no power of warding or committing to priſon.

*Pleaded* for the defenders: That ſuch was the conſtant practice of the Juſtices in that ſhire, as well as in many other ſhires in *Scotland*; and that this practice was founded on public utility.

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The Lord Ordinary repelled the defence; and, upon a reclaiming petition,

" The Lords found, That the Juſtices of Peace did wrong in granting " warrant for warding; but, in reſpect that the purſuer does not " now inſiſt, and that the Juſtices were in practice of granting ward- " ing, they aſſoilzie, and decern." s

Act. *Lockhart.* Alt. *Haldane & Bruce.*

N° CXI. 11th *July* 1754.

Mrs. *BURROUGHS* and her Siſters

againſt

Sir *ARCHIBALD GRANT.*

CAPTAIN *Burroughs* of *London* married *Mary Cartwright*, ſecond daughter of *Henry Cartwright* of the ſame place. By the marriage-articles, it was agreed, That the Lady's fortune, which was *L.* 1500, with a like ſum of the Captain's, making together *L.* 3000, ſhould be ſettled in truſt, the produce to the huſband for life; and, in caſe the wife ſhould ſurvive him, to her for life; and, in caſe of no iſſue, the property of the whole to the ſurvivor.

There having been many dealings between Sir *Archibald Grant* of *Moniemuſk* in *Scotland*, and Captain *Burroughs*, in the year 1733 they fitted an accompt, upon which there appeared a balance of *L.* 3810 : 9, due to Captain *Burroughs*; in ſatisfaction of which, the Captain agreed to accept of a bond for *L.* 2000; and thereupon the parties diſcharged each other.

Of even date with this diſcharge, Sir *Archibald* executed, at *London*, an heritable bond in the *Scots* form, for the ſaid ſum of *L.* 2000, upon his eſtate in *Scotland.*

Soon thereafter, Captain *Burroughs* executed, at *London*, an aſſignment in the *Scots* form; wherein he acknowledged, That the ſaid *Henry Cartwright* had made payment to him of certain ſums of money; and therefore aſſigned him the ſaid heritable bond for *L.* 2000; and thereupon Mr. *Cartwright* was infeft: but it afterwards appeared that this aſſignment was intirely in truſt for the uſe of the marriage above mentioned.

Sir *Archibald Grant*, and Captain *Burroughs* continued their dealings together; particularly, certain joint concerns in ſome mine-adventures in *Scotland.*

Captain *Burroughs* having died without iſſue, his wife, who was his executor, proved his will in *England*, and intromitted with all his effects.

Mr. *Cartwright* being alſo dead, Mrs. *Burroughs* and her two ſiſters, as co-heireſſes to him, brought an action, in the Court of Seſſion in *Scotland*, againſt Sir *Archibald Grant*, for payment of the ſaid bond.

*Alledged* for Sir *Archibald:* That the bond having been conveyed, by Captain *Burroughs*, to *Henry Cartwright*, not for value advanced, but only in truſt and ſecurity for the ſum of *L.* 3000, which Captain *Burroughs* was obliged to ſettle in truſt for the uſe of the marriage, the ſiſters of Mrs. *Burroughs* had no concern in the matter, as co-heireſſes to their father: and that

Mrs. *Burroughs* having intromitted with her huſband's effects, to an extent far beyond the ſum of *L.* 3000, the bond for *L.* 2000 reverted to be part of Mr. *Burroughs* eſtate.

Upon this ſtate of the caſe, *pleaded* for Sir *Archibald:* That Mr. *Burroughs*, as her huſband's executor, muſt be accountable to Sir *Archibald*, as her huſband's creditor, for certain large advancements he had made in relation to the mine-adventures; and her demand muſt be liable to retention, until ſhe account: That this was material juſtice, and was eſtabliſhed both by the civil and *Scots* laws.

2*do*, That, even ſuppoſing this *L.* 2000 bond were to be conſidered the proper claim of Mrs. *Burroughs* in her own right; yet it has been found, in many caſes, That, when an executor ſues for a debt due to himſelf, compenſation may be pleaded againſt him upon ſums due to the defender by the deceas'd, even tho' ſuch ſums were legacy. See the caſes of 12th *November* 1628, *Williamſon* againſt *Tweedie*, obſerved by *Spottiſwood*, *voce Executry*; and 15th *June* 1666, *Stevenſon* againſt *Hermiſhiels*, obſerved by Lord *Stair*. Such being the caſe, altho' it was true that the purſuer could not be brought to an account, in the firſt inſtance, in *Scotland*, yet, when ſhe is ſueing there, her ſuit may be properly encountered by reconvention. See *Voet. tit. De judiciis*, § 78. and *Dictionary*, *vol.* i. *p.* 330. *White* againſt *Skeen*.

*Replied*, among other things, for Mrs. *Burroughs*: That, even upon the ſuppoſition that the bond of *L.* 2000 was aſſigned in truſt for the uſes of the marriage, it had now, in terms of the articles, accrued to her, by the death of her huſband without iſſue: her demand is therefore under her own right, not as her huſband's executor; and therefore cannot be compenſated by any debt alledged due by her huſband to the defender. See *Voet. tit. De judiciis*, § 81. & 82. where he limits and explains the doctrine of § 78. ſaying, *Non etiam adverſus omnes actores reconventionem inſtitui poſſe conſtat*, *&c.*; and the caſes of *Williamſon* and *Stevenſon* are not parallel.

2*do*, An executor in *England*, who has intermeddled with *Engliſh* aſſets only, cannot be compelled, even by reconvention, to account in *Scotland*, where ſhe cannot be properly diſcharged. In the caſe of *White* againſt *Skeen*, the adminiſtrator in *England* ſued the heir in *Scotland*, for relief of a debt due by the defunct; which is intirely different from this caſe; becauſe there the adminiſtrator ſued not in his own right. Beſides, in a caſe between the Marquis and Marchioneſs of *Annandale*, ſimilar to that of *Skeen*, the houſe of Peers gave a different deciſion.

The Court having deſired to ſee the opinion of Council, learned in the laws of *England*, upon this laſt point.

Thoſe for Sir *Archibald Grant* gave their opinion, That, had Sir *Archibald* given a mortgage over an eſtate in *England*, and this ſuit been brought againſt him there, he might have brought a bill, in equity, againſt Mrs. *Burroughs* and her ſiſters, to diſcover for what conſideration this *L.* 2000 mortgage was aſſigned; and alſo againſt Mrs. *Burroughs*, to diſcover how far ſhe was otherwiſe ſatisfied of her demand of *L.* 3000 out of her huſband's eſtate; and thereupon the Court would decree an accompt with Sir *Archibald*, and ſtay proceedings upon the bond: That, unleſs this be allowed to Sir *Archibald*, when ſued in *Scotland*, juſtice cannot be done him; for, when he comes to take his remedy againſt Mrs. *Burroughs* in *England*, ſhe may be inſolvent, and not to be found.

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One of the Council for Mrs. *Burroughs*, a Gentleman of the greateſt eminence in the law, gave it as his opinion, That, if the truſt was made out, Sir *Archibald* might ſet up his demands on Mr. *Burroughs* againſt this demand for *L.* 2000, and ſo have an accompt of all dealings between them; and, if this accompt ſhould become neceſſary incidentally to a queſtion properly before the Court of Seſſion, he did not ſee why the inquiry might not be made, making all the allowances which would be made in *England:* he added, That, in *England*, every perſon, who has a claim upon an eſtate, has a right to call an executor to an account; and no body is bound by what is done in a cauſe to which he is no party. The other Council for Mrs. *Burroughs* was of opinion, That ſhe cannot be compelled, by the Court of Seſſion (if that Court proceeds by rules analogous to the courſe of the Court of *Chancery* in *England*,) to enter into an accompt, till proper foundation is laid for the demand, by a legal proof of it: That this muſt be done by a croſs-ſuit, without which, he thought, it could not be done; but not by reaſon of the locality of the probat of the will, or of the effects.

Theſe opinions being reported to the Court of Seſſion, the caſe ſeemed very intricate; and it was ſaid, That Mrs. *Burroughs* not only could not be properly diſcharged here, but How could ſhe accompt here by the law of *England?* How could ſhe ſhow here what claims were againſt her in *England*; or what allowances ſhe was intitled unto by the law there? or how could ſhe bring her huſband's *Engliſh* creditors to accompt here?

The Lords, on the 28th of *July* 1752, *inter alia*, " Found it competent to the defender to plead retention to the extent of the annualrents of the bond during Mr. *Burroughs* life; Found the purſuer, Mrs. *Burroughs*, who adminiſtrated the effects of the deceas'd Mr. *Burroughs* her huſband, in *England*, is not bound to accomp here for her intromiſſions, in virtue of that adminiſtration; but, to the end Sir *Archibald Grant* may have a competent time to conſtitute the debts owing him by Mr. *Burroughs*, and bring the purſuer to accompt for her deceas'd huſband's effects in a proper Court in *England*, ſtopt procedure in this action, both for principal and intereſt, to the 12th *November* 1754."

And, after hearing a reclaiming petition and anſwers, wherein the arguments above mentioned were handled at great length; and, after hearing the Lord Ordinary's report, touching certain facts relative to Sir *Archibald Grant*'s accompts with Captain *Burroughs*, and Captain *Burroughs* accompts with Mr. *Cartwright*.

The Lords, *inter alia*, " found, That there is no ſufficient evidence, that the ſum, covenanted by the marriage-articles, was ſatisfied, in whole or in part, by *Cartwright*'s intromiſſions with *Burroughs* effects, further than to the extent of *L.* 1040 *Sterling*, applied to the purchaſe of *L.* 1000 capital in South-ſea-ſtock; and found it competent to the defender to plead retention againſt the bond purſued on, to the extent of the annualrents during Mr. *Burroughs* life; but found it not competent to the defender to plead retention, on account of Mrs. *Burroughs* her being adminiſtrator of her huſband's effects in *England*, and of the defender's counter action

" againſt

" againſt her before this Court, for recovery or allowance of his " claim againſt her deceas'd huſband. s

Act. *R. Craigie. A. Lockhart.* Alt. Lord Advocate. *J. Ferguſon. A. Macdowell.* Clerk *Forbes.*

N° CXII. 17th *July* 1754.

Creditors of *JOHN BURNET*

againſt

*JAMES MURRAY* Receiver General of the Cuſtoms.

*JAMES MURRAY*, Receiver General of the cuſtoms, led an adjudication of the real eſtate belonging to *John Burnet* merchant in *Aberdeen*, for a debt due by him to the Crown, upon duties of *Tobacco*. *Burnet*'s other creditors led adjudications within year and day ; and inſiſted, in the ranking for a *pari paſſu* preference, upon the act 1661. *Ch.* II. *p.* 1. *cap.* 62.

*Argued* for the Crown: That, by the law of *England*, whether the common law or the ſtatutes, the Crown, before judgment obtained, was preferable in a competition with other creditors, upon the real, as well as perſonal eſtates of its debtors. See *Coke* 1. *Inſt.* 30. B 130. A & B, and 131. A & B: the reaſon given is, *Quia theſaurus Regis eſt fundamentum belli et firmamentum pacis.* See alſo the act 33. *Henry* VIII. *cap.* 39. § 2. & 25. where this is enacted in expreſs words. That, by the 6th article of the Treaty of Union, it is " provided, That all parts of the united king- " dom ſhall be liable to the ſame duties on import and export." And, by the 18th article, " That the laws, concerning regulation of trade, cuſtoms, " and ſuch exciſes, to which *Scotland* is to be liable, ſhall be the ſame in " *Scotland* as in *England*." And, by the 19th article, " That there be a " Court of Exchequer in *Scotland* for deciding queſtions concerning the " revenues of Cuſtoms and Exciſes there, having the ſame power and authority, in ſuch caſes, as the Court of Exchequer in *England*." That, by the act 6th *Annæ cap.* 26. for eſtabliſhing the Court of Exchequer in *Scotland*, it is enacted, " That all obligations for debts to the Crown ſhall have " the ſame force and effect as in the Court of Exchequer in *England*, ac- " cording to the true intent and meaning of 33. *Hen.* VIII. *cap.* 39. or a- " ny other law, *&c.* ; or by virtue of the *prerogative royal* ; and that her " Majeſty be preferred in all ſuits in the ſaid Court of Exchequer in *Scot- " land*, according to the ſaid ſtatute 33. *Hen.* VIII. and according to the " practice of the Court of Exchequer in *England*; and as well the bodies " as the lands and tenement-debts, credits, and ſpecialities, goods, chat- " tles, and perſonal eſtate of all debtors, or accomptants to the Crown, " or their debtors in *Scotland*, ſhall be ſubject and liable, by extent, inqui- " ſition, and ſeizures, or by any other proceſs, ways, or means, to the " payment of ſuch debts, duties, or revenues to the Crown ; and in ſuch " and the ſame manner and form, to all intents and purpoſes, as in the " Court of Exchequer in *England*." Hence it is evident, That, in *Scotland*, the Crown muſt be preferable to all other creditors, as well in the debtor's real, as his perſonal eſtate, without any reſpect to priority of diligence. Nor does it alter the caſe, That, in the act laſt mentioned, there

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is a proviſo, That no debts to the Crown ſhall affect or ſubject any real " eſtate in *Scotland* further, or otherwiſe, or in any other manner or form, " than ſuch real eſtate, may, and ought to be ſubject and liable by the laws " of *Scotland*." For that this proviſo means no more but that a perſonal obligation, granted to his Majeſty for the duties of Cuſtoms and Exciſe, does not, in terms of the 33. *Hen.* VIII. create a real lien upon the debtor's real eſtates in *Scotland*, for this were to make them liable *further*, nor are they liable to be attached by extent, or other *Engliſh* forms of diligence, for this were to make them liable *otherwiſe*, than in the law of *Scotland*: but yet, as ſoon as the real eſtate is affected, at the Crown's inſtance, according to the forms of the law of *Scotland*, then the prerogative of the Crown ought to take place, and give the ſame preference in *Scotland* as it does in *England*.

*Anſwered* for the creditors, 1*mo*, That, by the law of *Scotland*, before the Union, the King was intitled to no preference upon real land-eſtates, for revenue-debts, but according to his diligence: " That, by the Treaty " of Union, all the laws in *Scotland*, not inconſiſtent with any of the par- " ticular articles, are ſaved and preſerved."

That the preference given to the Crown over the eſtates belonging to its debtors was only given by the ſaid act, 6. *Annæ*, *cap.* 26. when pleaded before the Court by that act eſtabliſhed, the Court of Exchequer: That, ſuppoſing the caſe were even before the Court of Exchequer, the preference, in the act above mentioned, never could affect a real eſtate. For, 2*do*, This was carefully provided for by the proviſo above mentioned; where it is declared, not only that ſuch debts ſhall not affect the real eſtates further, or otherwiſe, and in no other manner nor form, than by the laws of *Scotland*; " But alſo that the laws of *Scotland* ſhall, " in all ſuch caſes, hold place and be obſerved." Neither does the ſtatute leave the matter to reſt even there; for, in another clauſe, it expreſsly provides, " That the validity or invalidity, and preference of the " title of the Crown to any honours, manors, lands, tenements, or he- " reditaments, or to caſualities belonging to the Crown, ſhall continue " to be tried and decided in the Court of Seſſion, as was uſed, and, of " right, ought to have been, by the law and practiſe of *Scotland*, at the " time of the Union, and not otherwiſe." This puts an end to all queſtion; and 'tis well it does ſo: for, were the Crown's plea good, the whole faith and ſecurity of our records would be at an end; the whole ſecurity of entails would be alſo at an end: for, by the 33. *Hen.* VIII. § 26, and 27. a ſimple perſonal obligation to the King, charges land to whomſoever it comes, whether by deſcent or purchaſe. Even entails are ſubjected, in like manner, to the Crown's debts. See *Wood's Inſt. book* 1. *cap.* 2. *p.* 20.

" The Lords found, That, before the Union, the King, by the laws " of *Scotland*, was intitled to no preference, for revenue-debts, upon " the real land-eſtates of his ſubjects, but only according to his dili- " gence; and found, That, by the act 6. *Annæ*, the laws of *Scot-* " *land* are ſaved, and declared to hold place and be obſerved; and " therefore found his Majeſty preferable only *pari paſſu* with the ad- " judgers, within year and day of his adjudication, and prefer him " and them, *pari paſſu*, accordingly. *Affirmed.* s

Act. *Lockhart*, *And. Pringle.* Alt. *Advocatus*, *R. Craigie.* Clerk *Gibſon.*

N° CXIII. 24th *July* 1754.

*WILLIAM HOOG* Merchant in *Rotterdam*

againſt

*KENNEDY* and *MACLEAN* Merchants in *Glaſgow*.

IN *July* 1751, *Kennedy* and Company commiſſioned certain goods from *Hoog*, to be ſent by the firſt ſhip bound for *Leith*, *Greenock* or *Borrowſtownneſs*. *Hoog*, on the 12th of *Auguſt*, ſhipped the goods on board the *Hopewell*, *Burton*, bound for *Leith*, and committed the invoice to the care of the Captain: he ſent no bill of loading, or formal letter of advice, by courſe of poſt; but, on the 3d of *September*, he tranſmitted a copy of his accompt-current, wherein he took credit *for goods ſent by* Burton *for* Leith *as* per *invoice*, without ſpecifying either the goods or the ſhip. The *Hopewell* ſailed from *Rotterdam* on the 6th of *September*, and, next day, was loſt. *Kennedy* and Company being purſued by *Hoog* for the price of the goods commiſſioned, *contended*, That they were not liable; and *pleaded*, That *Hoog*, as executor of a mercantile commiſſion, was bound to have ſent bill of loading, invoice, or letter of advice, by courſe of poſt, to his conſtituents; and that his omiſſion muſt ſubject him to the damage ariſing from the loſs of the goods. Neither does it alter the caſe, that the loſs was fortuitous; for that the cuſtom of merchants preſumes, That, where damage could have been avoided, on information given, it would have been avoided. Now, the defender might, on advice, have inſured the goods, and avoided the damage; without advice, he could not; *Hoog* muſt therefore be ſubjected to the damage, which, by his own neglect, became inevitable.

*Anſwered* for *Hoog*: The defences ought to be repelled; for that the commiſſion was executed according to its preciſe tenor; neither bill of loading, nor letter of advice, was required: and the cuſtom of merchants is, in this caſe,. indeterminate. Where regular poſts are not eſtabliſhed, it is impoſſible to ſend bills of loading, and letters of advice; where the ſhip generally arrives ſooner than the poſt, which happens in the run between *Holland* and *Leith*, it would be ſuperfluous. But, *ſeparatim*, the defenders might, in conſequence of the advice given, have inſured the goods. Advice was timeouſly given, That goods were ſhipped on board a veſſel, commanded by *Burton*, and bound for *Leith*; the defenders knew that the goods in queſtion were the only goods commiſſioned by them from the purſuer, they might therefore have inſured them; for that, altho' the voyage muſt be ſpecified in the policy of inſurance, the extent of the premium depending upon it; yet the name of the veſſel and of the Commander need not.

" The Lords found the defenders liable, and alſo found expences " due."

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Act. *J. Dundas*, *A. Lockhart*. Alt. *J. Dalrymple*. Clerk, *Juſtice*.

N° CXIV.

N° CXIV. 3d *Auguſt* 1754.

## *JOHN HYSLOP*
against
## *GEORGE RICHARDSON.*

IN the 1664, the Viſcount of *Stormonth* granted bond to *Carmichael* for 4000 merks, containing an obligation " to infeft him in all and ſun-" dry his lands, *&c. where-ever the ſamen lie within the kingdom*, for an " annualrent of 240 merks."

The precept of ſaſine in this bond was expreſſed in the ſame indefinite terms, and no infeftment followed upon it.

The fee of this bond became veſted, by adjudication, in *Robert Richardſon:* after his death, *George Richardſon*, one of his creditors, obtained, on the renunciation of the apparent heir, reſiding at *Edinburgh*, decreet *cognitionis cauſa*, and adjudged the bond before the Sheriff of *Edinburgh*. *John Hyſlop*, another of his creditors, brought a ſimilar proceſs, and adjudged the lands before the Lords of Seſſion.

In a competition of the creditors of *Robert Richardſon*, it was *objected* for *Hyſlop:* That the decreet of adjudication, pronounced by the Sheriff of *Edinburgh*, was null; for that the whole lands of the debtor adjudged in payment of the bond, lay without the juriſdiction of that Sheriff.

*Anſwered* for *George Richardſon*, as having right to the decreet of adjudication pronounced by the Sheriff: 1*mo*, Infeftment cannot be taken on a precept of ſaſine, wherein no lands are ſpecially expreſſed as the ſubject of the infeftment; in this view, the bond to *Carmichael* differs not from a bond heritable by deſtination; it produces no real action which may be limited to the *locus rei ſitæ*, but is merely a perſonal debt; it might therefore be adjudged, *cognitionis cauſa*, before that Sheriff, within whoſe juriſdiction the apparent heir of the perſon having right to the bond reſided.

But, granting that infeftment *could* have been taken in virtue of the general clauſe above recited, yet, until ſuch infeftment was taken, the bond remained a perſonal right, having no relation to any lands whatever; and was therefore adjudgeable before the Sheriff of *Edinburgh*.

Further, altho' *Robert Richardſon* had been actually infeft in this bond, yet the adjudication, *cognitionis cauſa*, againſt his apparent heir reſiding in *Edinburgh*, would have been competent before the Sheriff of *Edinburgh*; for that it adjudged the *univerſitas* of the *hæreditas jacens:* ſuch adjudication requires neither a previous denunciation on the ground of the lands themſelves, againſt the apparent heir renouncing, nor any valuation of the ſubject to be adjudged, but conveys to the creditor the whole *hæreditas jacens*, in payment of any debt whatever; this *univerſitas* has in itſelf no local ſituation, it may therefore be adjudged before that Sheriff to whoſe juriſdiction the apparent heir renouncing is ſubject; and it would ſeem incongruous to require diſtinct adjudications before the different Sheriffs, within whoſe territories the ſeveral parts of this *univerſitas* lie.

This may be illuſtrated by a ſimilar inſtance; when a co-partnery conſiſts of various ſubjects, heretable, as well as moveable, the heretable ſubjects, diſponed by each partner to the co-partnery, may not be affected by adjudication; but an arreſtment, laid in the hands of the co-partners, by the

the authority of the Judge, to whoſe juriſdiction they are ſubject, will carry the whole intereſt of any of the partners, altho' the heretable ſubjects, belonging to the co-partnery, be ſituated without the juriſdiction of the Judge. Now, ſince an arreſtment carries heretable ſubjects, wherever ſituated, becauſe an *univerſitas* is arreſted, an adjudication of an *hæreditas jacens*, which is alſo an *univerſitas*, muſt carry the whole heretable eſtate of the deceas'd, wherever ſituated.

*Replied* for *Hyſlop*: A Sheriff has properly no power over perſons reſiding without the limits of his territory, nor over things ſituated without the limits of his territory: hence it was, that antiently his ſentences could only receive execution by impriſonment or poinding within his county: this has been altered by law, and letters of horning and poinding may be directed on the decreets of Sheriffs. Thus the aid of the Court of Seſſion is neceſſary, in order to render effectual the decreet of a Sheriff beyond the bounds of his county. The caſe is the ſame with reſpect to appryſings; the brief of diſtreſs was antiently executed by the Sheriff; and, it appears from act 37. Parl. 5. *Ja.* III. 1469, That no goods of the debtor could be poinded, nor lands appryſed by the Sheriff, unleſs they were ſituated within the ſheriffdom; and, whenever they were ſituated in different counties, letters, directed to the reſpective Sheriffs, were neceſſary, in order that the whole might be attached.

Such was the rule in appryſings; and it muſt, of conſequence, obtain in adjudications of an *hæreditas jacens*; for that ſuch adjudication is no other than a legal diſpoſition granted by the Judge, where the debtor has failed to grant a voluntary diſpoſition; and no Judge can grant a diſpoſition of a ſubject which lies without the limits of his own territory, unleſs he be ſpecially authoriſed by law for that purpoſe.

To apply theſe obſervations to the preſent caſe: By the heretable bond in queſtion, the Viſcount of *Stormonth* became bound to infeft the creditor in his whole lands, for payment of a certain annualrent; the deed accordingly contains a precept for infefting. Had infeftment actually been taken, an adjudication before the Sheriff of *Edinburgh* would have been ineffectual; for that no lands, belonging to the Viſcount of *Stormonth*, were ſituated within this Sheriffdom: the conſequence muſt be the ſame in the preſent caſe; for that *Robert Richardſon*, altho' no infeftment followed, had a perſonal right to the whole lands belonging to the Viſcount, for payment of the annualrent.

In order to illuſtrate what has been ſaid, let it be ſuppoſed, That the creditor, in whoſe right *Richardſon* now claims, had inhibited the common debtor, and regiſtrated this inhibition in the particular regiſter at *Edinburgh*, but not in the regiſter appointed for the counties within which all the lands of the Viſcount of *Stormonth* are ſituated; it is contended, That ſuch inhibition could not have affected the heretable bond, as having no relation to lands within the county of *Edinburgh*; and an adjudication before the Sheriff of *Edinburgh* cannot convey a ſubject, which an inhibition, executed at *Edinburgh*, and regiſtrated in the particular regiſter there, cannot affect.

The bond in queſtion differs from a bond ſecluding executors; for that it is a right to be conſtituted on lands, and has a relation to ſpecific lands: it therefore is a proper ſubject for an appryſing or an adjudication *cognitionis cauſa*, which a bond ſecluding executors, being merely perſonal, is not.

It

It was *contended*: That infeftment could not follow upon this bond; but this, if true, would not be material; for neither could infeftment follow upon a reverſion ſimply perſonal, which nevertheleſs may be the ſubject of an adjudication, *cognitionis cauſa*, before the Sheriff of that ſhire, where the lands, to which it relates, are ſituated: but, further, infeftment may follow on this bond; for the debtor in the bond conſents that ſaſine be taken upon his whole lands in *Scotland*; and there ſeems no reaſon why the creditor may not execute the general precept.

The argument drawn from the effect of an arreſtment in the hands of copartners does not apply to the preſent caſe: after a copartnery has commenced, the ſubjects, conveyed by each partner to the copartnery, no longer belong to each partner; but the right of property in them is veſted in the company, and each partner has a right only to his proportion of their value after ſettling of accounts: this intereſt is arreſtable, but the arreſtment does not attach heretable ſubjects; for accompliſhing of which, the arreſter muſt firſt inſiſt in an action of forthcoming, and obtain decreet againſt the copartnery, and then he may affect the heretable ſubjects by adjudication.

An *hæreditas jacens* is an *univerſitas* of ſubjects adjudgeable; but the *univerſitas* can only be adjudged to the creditor by that Judge, within whoſe juriſdiction the whole ſubjects of the *univerſitas* lie.

" The Lords ſuſtained the objection to the decreet of adjudication, ob-
" tained before the Sheriff of *Edinburgh*, That the lands of the
" debtor in the heretable bond lay all out of the Sheriff's juriſ-
" diction." D

For *Hyſlop*, *C. Brown*. Alt, *D. Scrymgeour*.

N° CXV. 9th *Auguſt* 1754.

## His Majeſty's ADVOCATE
## againſt
## *JOHN CAMERON* of *Faſſefearn*.

IN the 1749, *John Cameron* of *Faſſefearn*, in terms of 20. *Geo.* II. *cap.* 41. offered to the Court of Seſſion a claim, conſiſting of ſeven different articles, upon the forfeited eſtate of *Lochiel*; and, at the ſame time, he produced the bonds, and other vouchers, upon which his claim was founded.

In *April* 1753, he was committed to jail, upon a charge of high treaſon. Thereafter, in terms of the act 1701, *William*, Seſſ. 8. and 9. *cap.* 6. he ſerved his Majeſty's Advocate with letters of intimation, in order to be brought to trial. In *Auguſt* 1753, before the days of the letters of intimation were elapſed, a new warrant of commitment was obtained againſt him; the charge of high treaſon was laid aſide, and he was charged with another crime, namely, the having forged ſome of the bonds above mentioned, or at leaſt uſed them, knowing them to be forged. And there was this ground of ſuſpicion againſt him, That, after theſe bonds had been produced in Court, they were privately abſtracted from the proceſs; and there was the ſtrongeſt preſumption, That, upon the ſurmiſe of this charge, the defender himſelf had abſtracted them. During the courſe of

his trial for this crime, he preſented to the Court three ſeveral petitions, one upon the 10th of *Auguſt* 1753, one upon the 6th *March* 1754, and one upon the 5th *Auguſt* 1754, praying to be admitted to baill. And, it was *pleaded* for him, That, tho' by the act 1701, baill might be refuſed in capital caſes, yet it was not prohibited: that this poſition was juſtified by ſundry inſtances in the practice of the Court of Juſticiary; particularly, in the 1740, in the caſe of Sir *Robert Munro*, and Mr. *Munro* of *Culrain*, his brother, accuſed of murder; and, in the caſe of *John Hog* an officer in the Cuſtoms, charged with a capital crime. 2*do*, By the ſame act 1701, he was intitled, from the long continuance of his trial, to be admitted to baill; for that, when a priſoner runs his letters in terms of that act, he is thereby intitled, whatever his crime be, were it even treaſon, to have his trial concluded in forty days after it begins, otherwiſe to be aſſoilzied, and ſet at liberty: that this is alſo the rule when the trial proceeds without the priſoner's having run his letters; otherwiſe the privilege, ſecured by this act to the ſubject, might always be made ineffectual: that, however, he carried this argument no further, than only to obtain his enlargement upon finding baill. This was the more reaſonable, as he had already ſuffered the grievous pain of ſixteen months impriſonment; and his trial might poſſibly laſt as long as it had done: that, as the act 1701 contained no exception with regard to the crime of forgery, the Lords would not incline to admit an extenſion, which might render uſeleſs the valuable privileges ſecured by this ſtatute.

*Anſwered* for his Majeſty's Advocate: That the defender is accuſed of a capital crime, and, tho' the Court may have a diſcretionary power to grant baill, yet the defender is not intitled, *de jure*, to demand it; the leſs that the long delay, in this trial, is intirely owing to the want of the writings ſaid to be forged, which, from the proof already brought, plainly appear to have been abſtracted by the defender. 2*do*, By the law of *Scotland*, the crime of forgery is different, with regard to the manner of trial, from all other crimes; it is triable in the Court of Seſſion; the diets are not peremptory; and the maxim is, That *nunquam concluditur in falſo*: this crime therefore, *ſua natura*, cannot fall under the limitations of the act 1701.

" The Lords refuſed the deſire of the ſeveral petitions above men-
" tioned, for admitting the defender to baill."

In the courſe of this trial, " the Lords alſo over-ruled the defender's
" plea, that this trial could not proceed, becauſe the writs alledged
" to be forged were loſt or a-miſſing.

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Act. *Advocatus A. Pringle.* Alt. *Ferguſon, Lockhart, et alii.* Clerk *Gibſon.*

N° CXVI.

N° CXVI. 15th *November* 1754.

## MAGISTRATES and TOWN-COUNCIL of *Lauder* against *THOMAS BROWN.*

THE Magiſtrates and Town-Council of *Lauder* charged *Brown* for payment of a toll of two ſhillings *Scots* for each loaded cart belonging to him, and paſſing thro' the liberties of *Lauder*; of this charge *Brown* obtained ſuſpenſion.

The Magiſtrates, in ſupport of their charge, produced a charter of confirmation, granted to the burrough of *Lauder* in 1502, by *James* IV. and containing a general clauſe, *cum omnibus annuis reditibus et poſſeſſionibus quibuſcunque*; which charter was ratified by Parliament in the year 1633. They alſo produced, from the books of Town-Council, a table of cuſtoms, dated in 1703, and bearing *for ilk long cart two ſhillings*; and they offered to prove immemorial poſſeſſion of the toll demanded.

A proof was, before anſwer, granted; and the caſe was reported by Mr. *William Grant* of *Preſtongrange*, Lord Probationer.

The defender *pleaded*, in point of relevancy, 1*mo*, That highways are *juris publici*, and that a toll to be levied on them may not be granted, but by the joint authority of King and Parliament; and ſo the Court expreſsly found, 15th *November* 1621, Town of *Linlithgow* againſt the Fleſhers of *Edinburgh*, obſerved by *Durie*. The ratification in 1633 does not afford any argument in ſupport of the toll; for that ſuch ratifications paſſed of courſe, and without being particularly conſidered. 2*do*, *et ſeparatim*, That the charter, on which the chargers found, contains no ſpecial grant of tolls; and immemorial poſſeſſion cannot ſupport an exaction to which no title whatever is pretended.

*Anſwered* for the purſuers: The Crown of *Scotland* had an undoubted right of impoſing tolls, to be levied on all carriages paſſing thro' certain places; many ſuch tolls have been ſo eſtabliſhed without the authority of Parliament. The deciſion produced for the defender is either erroneous, or founded on ſome ſpecial circumſtances omitted by *Durie*. The grant, in favour of the burrough of *Lauder*, is general; but immemorial poſſeſſion proves the toll in queſtion to have been granted, and aſcertains its extent.

" The Lords found the burrough of *Lauder* has right to continue the " poſſeſſion of levying the ſeveral tolls and cuſtoms mentioned in " the act and rates of the ſaid burrough, dated 30th *September* 1703; " and found the letters orderly proceeded, as to the cuſtoms enume- " rated in the ſaid act: but found, That the burrough has no right " to exact any toll or cuſtom on coal or lime, paſſing thro' the ſaid " town and territories, in carts, on horſe-back, or otherwiſe. D

Act. Sir *D. Dalrymple*, *J. Grant*, *A. Lockhart*. Alt. *W. Stewart*, *A. Pringle*, *D. Rutherfoord*.
Reporter *Preſtongrange*. Clerk *Forbes*.

*N. B.* The reaſon of the laſt part of the interlocutor, was, That, as to theſe particulars, poſſeſſion was not proved.

N° CXVII.

N° CXVII. 19th *November* 1754.

## *THOMAS DUNDAS* Eſquire
againſt
## *Mr. JOHN MACLEOD* Advocate.

*ROBERT SIMPSON*, a collier, belonging to the coal-work of *Quarrell*, having differed with the tax-man of the coal, deſerted the work in the year 1737, and went to Mr. *John Macleod*'s coal-work at *Bowhouſe*.

Mr. *Dundas* afterwards purchaſed the lands and coal of *Quarrel*, and got an aſſignation to the colliers, and, amongſt others, to *Robert Simpſon*; whereupon he brought a proceſs againſt Mr. *Macleod*, concluding for the delivery of the ſaid *Robert Simpſon*.

*Pleaded* for the defender: That *Robert Simpſon* had been away ſeveral years from the coal-work of *Quarrel*, and had been ſeveral years at the defender's coal-works, without interruption, and without being redemanded by his former maſter; and therefore the defender was not obliged to reſtore him: for, by a collier's being abſent above the ſpace of one year from his maſter, the maſter loſes his property in him; and, if the collier has wrought, during the ſpace of one year, at another work, he becomes a bound collier to that work. And that ſuch is the common law, with reſpect to colliers, appears from the 11th act Parliament 1606; whereby it is enacted, "That, in caſe any receive or entertain colliers, ſalters, or "coal-bearers, without a ſufficient teſtimonial of their maſter whom they "laſt ſerved, the maſter from whom they came, challenging their ſervants "within year and day, that the party whom frae they are challenged, "ſhall deliver them back again within twenty four hours, under the pain "of one hundred pounds *Scots*, to be paid to the perſons whom frae "they paſſed."

From which act, it is to be obſerved, *Firſt*, That poſſeſſion gives the right to the colliers; for they are to be reſtored to the maſter whom they laſt ſerved, and not to him to whom they firſt belonged. 2*dly*, That their former maſter loſes his right to them, if he do not redemand them within year and day after their leaving his ſervice; ſeeing the order for reſtoring them is only in caſe requiſition be made within year and day of their leaving their ſervice. It cannot be alledged, That the ſtatute only meant that the penalty of *L.* 100 *Scots* could not be claimed, if requiſition be not made within year and day; for the ſtatute has made no proviſion for reſtoring colliers after their being year and day abſent from their former maſter, which it ſurely would have done, if the property of them remained with him after the year.

*Anſwered* for the purſuer: That no law has introduced ſo ſhort a negative or poſitive preſcription of the right to colliers, as is contended for by the defender; and no ſuch preſcriptions are either enacted, or ſuppoſed by the ſtatute 1606. That act has declared it to be unlawful to receive or entertain another man's colliers, without a teſtimonial from the maſter whom they laſt ſerved, or at leaſt an atteſtation of a reaſonable cauſe of their removing, ſubſcribed by a Magiſtrate; and a coal-maſter receiving a collier without ſuch teſtimonial or atteſtation, is guilty of a direct tranſ-

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greſſion of the law; and therefore a poſſeſſion ſo unlawfully attained can never intitle the offender to the property of the collier.

The remedy introduced by the ſtatute is a ſummary and poſſeſſory one, in favour of him who had the recent poſſeſſion of the collier, againſt the unlawful receiver and detainer, in caſe requiſition be made within year and day: but, if requiſition be not made within that ſpace, the maſter does not thereby loſe his property in the collier, but may recover him by an action at common law. Thus, tho' the action of ſpulzie be limited by ſtatute to three years, yet this preſcription of the ſummary and penal remedy does not give the ſpoliator a right of property in the goods ſpulzied, after the three years; but an action for reſtitution and damages is competent againſt him, at any time within forty years.

"The Lords found, That the purſuer had right to the property of "the collier."

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Act. *Lockhart* and *Bruce*. Alt. *Tho. Hay*, and *Andrew Pringle*.
Reporter *Drummore*. Clerk *Forbes*.

N° CXVIII. 6th *December* 1754.

Captain *HAMILTON BLAIR*

againſt

*ROBERT SHEDDEN*, and others, Feuars of *Kerſeland*.

THE queſtion between the parties, was, Whether, in computing the poſitive preſcription of real rights, the years of minority are to be deduced?

*Pleaded* for *Shedden* and others: That the years of minority are not to be deduced appears from the reaſons following.

1*mo*, According to the latter feudal ſyſtem, land could only be conveyed by writing; if the vaſſal could not produce titles in writing, connecting him with the ſuperior, the land returned to the ſuperior: hence a multitude of titles was neceſſary, their number muſt have increaſed daily, and they might often chance to be loſt or miſlaid. To remedy theſe inconveniencies, the act 214. Parl. 14. *J.* VI. 1594, diſpenſed with the production of many of theſe titles, after the lapſe of forty years; this act eſtabliſhed no preſcription, but only a legal preſumption that ſuch deeds had exiſted. The act 12. Parl. 22. *J.* VI. 1617, proceeded further, and, by its firſt part, diſpenſed with the production of all deeds beyond forty years. This part of the ſtatute introduced no preſcription properly ſo called, but only a preſumption, the ſame in nature with that introduced by the act 1594, but more ample: in this the benefit of perſons in poſſeſſion, the ſuppoſed proprietors, was conſidered; as minors ought only to be indemnified from the conſequences of that negligence which their nonage occaſions; and, as real rights cannot, in law, be loſt by negligence alone, the exception of minority was not neceſſary, in this part of the ſtatute: but the caſe is different as to moveable ſubjects, the right to them may be loſt by the negative preſcription, the denial of action being equivalent to a forfeiture of the right: minors ought not to be forfeited for their negligence alone; they are therefore ſecured from the negative preſcription, by the ſecond clauſe of the act 1617. And, ſuppoſing the act 1617 to relate to both

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preſcriptions, it may be obſerved, That it treats firſt of the poſitive, then of the negative preſcription; in the former part of the act, falſhood only is excepted; but, to the latter, this clauſe is ſubjoined: "and ſicklike "it is declared, That, in the courſe of the ſaids forty years preſcription, "the years of minority and leſs age ſhall no ways be accounted, but only the years during the which the parties, againſt whom the preſcription "is uſed and objected, were majors." This clauſe reſpects the negative preſcription only, both as it had been laſt mentioned, and as it is termed *the ſaids forty years preſcription.*

2*do*, The act 1617 introduced preſcription in imitation of the civil law, and, by that law, minority was not deduced in computing the poſitive preſcription.

3*tio*, Minority is not deduced from the ſhorter ſtatutory preſcriptions known in our law; thus minority is not deduced in the preſcription of warnings, nor in that of houſe-rents, and merchant-accompts; neither ought it to be deduced from the poſitive preſcription in land-rights.

4*to*, The Crown and lunatics are in a ſituation reſembling that of minors; as the former are not ſecured from the poſitive preſcription; ſo neither ought the latter.

5*to*, Were minority to be deduced from the poſitive preſcription, purchaſers, who cannot know the endurance of ſuch minorities, could never be ſecure.

*Pleaded* for *Hamilton Blair:* Minority ought to be deduced from the years of the poſitive preſcription: for that, 1*mo*, No diſtinction is made in the ſtatute between the poſitive and the negative preſcription: the expreſſion, *ſaids forty years preſcription*, relates not particularly to the negative preſcription; the word *preſcription* is never uſed until mention is made of it in the exception; it muſt therefore relate to the title of the act, *Anent preſcription in heretable rights*; and conſequently comprehends both preſcriptions: for this reaſon likewiſe the exception of minority is properly inſerted in this place, as reſpecting both: and the exception of falſhood, being an objection to that title which is requiſite in the poſitive preſcription, is properly inſerted in the firſt part of the act. After the years of the poſitive preſcription have run, falſhood only is excepted; but, to argue from this, that minority is not to be deduced, is to beg the queſtion, which is, Whether the years, requiſite in the poſitive preſcription, run during minority? The act allows forty years to majors, within which they may claim; were no longer time allowed to minors, he who could claim, and he who could not, would be in the ſame condition, which ſeems unjuſt: the act ſuppoſes that a claim may be made; this comprehends not minors, who cannot claim. And here it muſt be obſerved, That, according to the argument uſed for *Shedden*, a minor having a perſonal claim of debt, is ſecured from preſcription, as well poſitive as negative; but that a minor having a real right to an eſtate, may loſe it by the poſitive preſcription: a proper wadſet is a real right, an improper, is a debt; and the minor would loſe the former, not the latter, which is abſurd; the law could not mean to preſerve a claim of debt, and yet to deſtroy a claim of property.

2*do*, The act 1617 eſtabliſhed, in imitation of the civil law, preſcription itſelf, not its particular modes; and, ſuppoſing that, by the civil law, this preſcription took place againſt minors, yet ſuch minors might, by that law, have been reſtored: but reſtitutions of this nature take not

place

place with us, *Stair. lib.* 2. *tit. ult.* § 18. The law of *Scotland* could not mean to eſtabliſh the preſcription of the civil law againſt minors, when it denied them the remedy of reſtitution provided by that law.

3*tio*, In the preſcription of warnings, minority is not computed, nor in the preſcription of houſe-rents and merchant-accompts: for that the former may be renewed, the latter proved to be owing, by the oath of the debtor; and, no argument can be drawn from a preſcription, by means of which a particular method of probation only is prohibited, to one by means of which all action is denied.

4*to*, The Crown and lunatics may be reſtored minors, not, hence the poſitive preſcription runs againſt the former, but not againſt the latter.

5*to*, The argument from the inſecurity of purchaſers is not concluſive: for that no ſuppoſed inconveniency can weaken the force of a ſtatute; neither, in fact, are any purchaſers ſatisfied with a progreſs of forty years; but they examine into the rights beyond that period, in order that ſome allowance may be made for the chance of the minorities which may have occurred.

" The Lords found, That minority muſt be deduced from the years of " the poſitive preſcription." D

For *Shedden, Mackintoſh, J. Dalrymple, Miller, Lockhart.* Alt. *Burnet, Ferguſon, Advocatus.*

N° CXIX. 10th *December* 1754.

*ALEXANDER FRASER*

againſt

His Majeſty's ADVOCATE.

*ALEXANDER FRASER*, ſecond ſon of the late Lord *Lovat*, entered a claim upon the forfeited eſtate of *Lovat*, in terms of 20th *Geo.* II. *cap.* 41. for *L.* 4000, contained in a bond of proviſion, granted by Lord *Lovat* in favour of the claimant.

*Objected* for the Crown: That this bond was never a delivered evident.

*Anſwered* for the Claimant: That delivery of bonds of proviſion is preſumed by law, tho' found in the father's cuſtody, whom law preſumes to be the proper keeper of ſuch bonds; and that, in the caſe of the children of *Bowhill*, after the rebellion 1715, bonds of proviſion to the children, with a clauſe impowering the father to revoke, were ſuſtained by the Court of Inquiry; and that non-delivery, and a power of revocation, are equivalent.

*Replied* for the Crown: That, tho' the law preſumes delivery of bonds of proviſion, when the queſtion is among the children, yet the caſe is intirely different, when ſuch bonds come to be ſet up as claims againſt the Crown: were theſe to be allowed, a way would be found out to defeat every forfeiture whatever. The caſe of *Bowhill* was erroneouſly judged, and no precedent to this Court. S

" The Lords diſmiſſed the claim."

Act. *Ferguſon, Lockhart, J. Dalrymple.* Alt. *Advocatus, A. Pringle.* Clerk *Kirkpatrick.*

N° CXX.

N° CXX. 11th *December* 1754.

*WILLIAM ROSS*

againſt

*GEORGE* and *JAMES MAXWELLS.*

DURING the dependance of an action at the purſuer's inſtance, againſt *Alexander Maxwell*, before the Sheriff of *Haddington*, *Alexander* died. The purſuer called, by letters of ſupplement, *George* and *James Maxwells*, both reſident in *London*, as repreſentatives of *Alexander*, to appear before the Sheriff: the ſheriff found they were not legally ſummoned. And, the caſe being brought, by advocation upon the head of iniquity, before the Court of Seſſion, it was reported by Mr. *Thomas Hay* of *Huntington* Lord Probationer.

The Lords ſeemed to be of opinion, That, in caſes of this kind, the proper form of proceeding was to have called the defenders, by a transference to appear before the Court of Seſſion; and then to have advocated the cauſe from the Sheriff, not for iniquity, but for defect of juriſdiction. However,

" They advocated the cauſe, and remitted to the Ordinary to proceed." s.

Alt. *P. Wedderburn.*

N° CXXI. 12th *December* 1754.

*ISABELLA GRANT*

againſt

*DAVID SUTHERLAND.*

BY marriage-contract, between *James Sutherland* of *Pronſie*, and *Iſabella Grant*, *James* bound himſelf to provide her in a certain jointure.

At this time, *James*, as apparent heir to his predeceſſor, was in poſſeſſion of the eſtate of *Pronſie*, but had never made up any title thereto; in this manner of poſſeſſing he continued till he died.

After his death, *David Sutherland* made up no titles to the eſtate, but continued to poſſeſs it as apparent heir, in the ſame manner that *James* had done.

*Iſabella Grant* brought a proceſs againſt *David* for payment to her of her jointures.

*David*'s defence againſt the action was, That *James* not being infeft, had no power to make a jointure effectual againſt the eſtate, and he not having connected himſelf with *James*, was not bound by his deeds.

*Iſabella anſwered:* That, for the deeds of the firſt apparent heir, three years in poſſeſſion, the act 24. 1694 bound the ſecond apparent heir, either making up titles to a remote predeceſſor, or not making up titles at all.

The abſtract queſtion came to be, Whether an apparent heir, poſſeſſing the eſtate, but not making up titles to it, was bound by the onerous deeds of the immediately former apparent heir three years in poſſeſſion.

The

The ſtatute, ſo far as regards this queſtion, conſiſts of two clauſes. By the firſt, upon a recital " of the frequent frauds and diſappointments that " creditors ſuffer upon the deceaſe of their debtors, and through the con- " trivance of apparent heirs to their prejudice, it is enacted, That, if any " one ſerve himſelf heir, or, by adjudication on his own bond, ſhall ſucceed " not to his immediate predeceſſor, but to one remoter, as paſſing by his " father to his good-fire or the like, then he ſhall be liable for the debts " and deeds of the perſon interjected, to whom he was apparent heir, and " who was in the poſſeſſion of the lands and eſtate to which he is ſerved " for the ſpace of three years, and that in ſo far as may extend to the value " of the lands and eſtate, and no further." By the ſecond clauſe it is enacted, That, " if any apparent heir ſhall, without being lawfully ſerved " or entered heir, either enter to poſſeſs his predeceſſor's eſtate, or any part " thereof, or ſhall purchaſe any right thereto, or to any legal diligence or " other right affecting the ſame, otherways than the ſaid eſtate is expoſed " to a lawful public roup, and as the higheſt offerer thereat; his foreſaid " poſſeſſion or purchaſe ſhall be reputed a behaviour as heir, and a ſuffi- " cient paſſive title to make him repreſent his predeceſſor univerſally, and " to be liable for all his debts and deeds, as if the ſaid apparent heir, poſ- " ſeſſing or purchaſing, as ſaid is, were lawfully ſerved and entered heir to " his ſaid predeceſſor."

*David Sutherland* pleaded his defence in this manner:

By the general law of *Scotland*, an eſtate not veſted in a perſon by proper titles, could not be made liable for his debts, nor had the creditor of an apparent heir, who died unentered, any remedy againſt his eſtate.

Certain frauds committed by apparent heirs, made ſome exceptions from this rule neceſſary. Theſe exceptions are contained in the act 1695. This act did not mean to overturn the general law, but to correct it in ſome inſtances.

The firſt clauſe of the ſtatute 1695 introduced an exception, where one not veſted in an eſtate, but remaining apparent heir in it, has continued to poſſeſs it for three years; the next heir who paſſing him by, ſerves heir to a former predeceſſor, or who, by adjudication on his own bond, as charged to ſerve heir to a remote predeceſſor, takes up the eſtate, ſhall be ſubject to his debts to the extent of the eſtate: but here the Defender has neither ſerved, nor taken up the eſtate of *Pronſy* by adjudication on a truſt-bond; therefore he is not liable on the firſt branch of the ſtatute.

Again, by the ancient law of *Scotland*, if the heir lay out unentered, the creditor of his predeceſſor could not reach even the eſtate in which the predeceſſor had been veſted. To remedy this, the act 106. 7th parl. *James* V. 1540, and 27. parl. 23. *James* VI. 1621, were made, impowering creditors to reach the eſtate of their debtor, though he had not been veſted in it.

To elude theſe acts, and to be able to compete with the creditors, apparent heirs fell upon a contrivance of purchaſing in diligences againſt the eſtate, and poſſeſſed it as creditors, when they refuſed to poſſeſs it as heirs.

The remedy applied to the evil which occaſioned the ſtatutes 1540. and 1621. was too weak; for all that the heir could loſe by his obſtinacy was the eſtate itſelf, and there was no remedy applied to the other evil at all.

To increaſe the penalty in the one caſe, and to invent a penalty in the other, the ſecond branch of the ſtatute 1695. was paſſed, which ſubjected the apparent heir poſſeſſing, yet not ſerving to the perſon *laſt veſted*, or

purchaſing in diligences affecting the eſtate of the perſon *laſt veſted*, not only to the value of the eſtate, but to the extent of the whole debts of his predeceſſor who was ſo *veſted:* but *James Sutherland* was never *veſted*; therefore the Defender is not liable on the ſecond branch of the ſtatute.

The firſt clauſe regarded an apparent heir, who, to elude the debts of the laſt apparent heir three years in poſſeſſion, paſſed him by, either by ſerving to a remote predeceſſor, or by being charged to ſerve to him on his truſt-bond. The laſt clauſe regards the apparent heir who, to elude the debts of the perſon *laſt veſted*, avoids ſerving to him, or purchaſes diligences affecting his eſtate; and the ſtatute in queſtion, being a correctory law, and a penal law derogating from the general law of *Scotland*, is ſtrictly to be interpreted, and ought not to be extended to caſes beyond the letter of the act.

*Anſwered* for *Iſabella Grant:* The view of the ſtatute 1695. was to obviate all the frauds of apparent heirs that could be uſed. It is not penal; it is only preventive of fraud, and enabling the general rules of law and juſtice to take place. Where there is a defect in the common law with regard to the prevention of fraud, and a remedy is provided by a correctory ſtatute, that ſtatute ought to be extended to every fraud that falls within the purview and reaſon of it.

In this view, the Defender is liable, even on the firſt clauſe of the ſtatute: for the particular frauds enumerated in that clauſe, are only deſcriptive of the common methods in which apparent heirs took up their predeceſſors eſtates, but are not meant to limit the remedy to thoſe frauds only, but on the contrary are meant to comprehend every other device by which apparent heirs could take up their predeceſſor's eſtate, paſſing over the interjected apparent heir. If it provided for the fraud of thoſe who made up titles in a certain way, Is it to be ſuppoſed, it intended no proviſion for the fraud of thoſe who made up no titles at all?

Again, he is liable even on the words of the ſecond branch of the ſtatute; for that branch is directed againſt thoſe, who, in order to diſappoint the creditors of the former apparent heir, continue to poſſeſs the eſtate under the naked title of apparency.

The words in this branch, *enter to poſſeſs his predeceſſor's eſtate*, cannot mean the eſtate of the perſon *laſt veſted*, but muſt mean the eſtate of the *former apparent heir:* for the firſt branch of the ſtatute, ſpeaking of one who makes not up a title to the former apparent heir three years in poſſeſſion, calls that apparent heir *immediate predeceſſor*. If then predeceſſor in the firſt clauſe means *apparent heir*, it cannot in the ſecond clauſe be tranſmuted, and made to apply to a different perſon, to wit the predeceſſor *laſt veſted*.

The ſame thing appears from the conſequence of a contrary conſtruction. It never was doubted that the apparent heir poſſeſſing became thereby univerſally liable for the debts of the remoter predeceſſor who died laſt veſted: Could it then be in the view of the legiſlature, in a branch of this correctory ſtatute to enact what was formerly known to be undoubted law; this branch then relates to one ſucceeding to an *apparent heir*, and not to one ſucceeding to the perſon *laſt veſted*.

According to the conſtruction pleaded for the Defender, this ſtatute, calculated to obviate the frauds of apparent heirs, would give the ſtrongeſt encouragement to thoſe frauds: for then an apparent heir refuſing to enter, might

might hold the eſtate without paying the debts of the immediate apparent heir, which debts the ſtatute in queſtion was intended to protect.

" Found that *David Sutherland* is not liable to pay the purſuer, *Iſabella* " *Grant*, her annuity in her contract of marriage with *James Suther-* " *land*; and therefore aſſoilzied. *Affirmed*. J. D.

Act. *Macdowal, W. Grant, And. Pringle.* Alt. *Ferguſon, Brown, Simon Fraſer.*

N° CXXI. 14th *December* 1754.

## *WILLIAM PEW*

againſt

## *WILLIAM MILLER.*

*PEW* had right to a leaſe of certain lands belonging to the Trinity Hoſpital in *Edinburgh:* in this farm there is a narrow piece of ground, which ſtretches for near five hundred ells into the lands of *Miller*. *Miller*, purpoſing to incloſe his lands, brought an action before the Sheriff, againſt the Magiſtrates and Town-Council of *Edinburgh*, as adminiſtrators of the Hoſpital, and againſt *Pew*, as their tenant; concluding, in terms of the act 17. Parl. 2. *Charles* II. That the piece of ground above mentioned ſhould be adjudged to him in exchange for other ground of equal value. The Magiſtrates conſented to the exchange; but *Pew* oppoſed it: the Sheriff appointed certain perſons for valuing the ground, approved of their report, and ordained the ground to be meaſured, in order to compleat the exchange.

*Pleaded* for *Pew*, in a bill of advocation: The Sheriff has exceeded the powers veſted in him by law; the act 17. Parl. 2. *Charles* II. in order to correct any ſmall irregularity in marches, and thereby to facilitate the incloſing of ground, allows the Sheriff to adjudge little pieces of ground to one or other of contiguous proprietors; but it does not allow him ſo to adjudge large parcels of ground, as in the preſent caſe, where three acres and a half are meant to be adjudged to *Miller*; ſo conſiderable encroachments on property can only be authorized by the expreſs will of the Legiſlature. The act of *Charles* II. has not authorized them; and, as it is a correctory ſtatute, it may not be extended by interpretation.

*Anſwered* for *Miller:* The act 17. Parl. 2. *Charles* II. altho' correctory, is framed for public utility; it neither mentions *ſmall irregularities*, nor determines the quantity which may be exchanged. The march was, in terms of the ſtatute, *ſo uneven, as to occaſion great inconveniency in the incloſing*; for that the projection could not have been incloſed, but at an expence exceeding the value of the ground: the caſe therefore is within the ſtatute, which authoriſes the Sheriff *to adjudge ſuch parts of the one or other heritor's ground, as occaſion the inconveniency betwixt them, ſo as may be leaſt to the prejudice of either party*. The Sheriff has purpoſed to follow this rule, by adjudging to *Miller* the ground projecting into his lands, to *Pew*, ground of equal value.

" The Lords refuſed the bill of advocation." D

Act. *D. Rae.* Alt. *Miller* and *Lockhart.*

N° CXXII.

N° CXXII. 7th *January* 1755.

Mrs. *JEAN FINLAYSON*

againſt

Meſſrs. *MURRAY* and *FORBES*, two of the Principal Clerks of Seſſion.

*ALEXANDER FINLAYSON*, one of the Depute-clerks of Seſſion, died in *March* 1754, two days after the riſing of the Seſſion; and the emoluments which would have belonged to him, had he been alive, from the day of his death to the admiſſion of his ſucceſſor, were intromitted with by Meſſrs. *Murray* and *Forbes*, the Principal Clerks in that office in which Mr. *Finlayſon* wrote.

Mrs. *Jean Finlayſon*, daughter and executor of Mr. *Finlayſon* applied, by petition to the Court of Seſſion; ſetting forth, That theſe emoluments belonged to her as executor to Mr. *Finlayſon*; for, as he had done the duty of Depute-clerk during the Seſſion, his executor ought to reap the fruits of that labour, namely, the dues paid for extracts of acts and decreets during the following vacation; and that, upon the death of Mr. *Cunningham* in 1705, and of Mr. *Brown* in 1750, his executors received the emoluments of the office till the admiſſion of their ſucceſſors; and therefore prayed, That the Lords might ordain the emoluments from Mr. *Finlayſon*'s death, to the admiſſion of his ſucceſſor to be paid to her.

*Anſwered* for Meſſrs. *Murray* and *Forbes*: That the emoluments of the office ariſe, and are due, *de die in diem*; and therefore the right of the defunct determines immediately on his death: it may thereby ſometimes happen, that one does not receive the dues of extracts in theſe proceſſes, in which he acted as Clerk; but, for this, he had the chance of receiving, at his entry, the dues of extracts, in proceſſes where he did not labour; and, whatever one may gain or loſe by ſuch chances, there muſt be a general rule obſerved that may apply to all caſes: and it has been the conſtant rule, That, when a Principal, or Depute-clerk dies, his executors get none of the dues paid for extracts, or other things, after his death, but theſe belong to the Principal Clerk, or Clerks of the office to which the deceas'd Clerk belonged; which contingent profits are the only fund the Principal Clerks have for defraying certain extraordinary expences attending the office: and altho', in the inſtances condeſcended on by the petitioner, the dues were given to the executors of the deceas'd Clerks, yet this was favour, not right.

" The Lords refuſed the deſire of the petition." B.

Act. *Thomas Miller*. Alt. *D. Dalrymple*. Clerk *Juſtice*.

N° CXXIII. 9th *January* 1755.

*JOHN ROWAND* ſenior, Merchant in *Glaſgow*

againſt

*JOHN FREEMAN* and Company, Merchants in *Briſtoll*.

IN *November* 1753, *John Rowand* wrote to *John Freeman* and Company, in theſe words: " Incloſed you have invoice of ſundry goods, which " pleaſe

" pleaſe ſhip on my account and Company, addreſſed to *Rowand, Wells*, and " *Rowand*, merchants in *Charleſtown, South Carolina.*" The goods were accordingly ſhipped, and *Freeman* and Company brought a proceſs againſt *John Rowand*, before the high Court of Admiralty, for payment of the price.

*John Rowand* pleaded compenſation upon the price of certain goods which he had ſent to the purſuers; they contended he could not propone any defences till he found caution, *judicio ſiſti et judicatum ſolvi:* the Judge-Admiral ordained him to find ſuch caution; which he having failed to do, decreet went againſt him for the ſums libelled.

*John Rowand* applied to the Court of Seſſion for a ſuſpenſion of this decreet; and *pleaded*, That the extraordinary powers of the Judge-Admiral, whereby he obliged parties to find caution *judicio ſiſti et judicatum ſolvi*, could only be exerciſed in *maritime* cauſes, where the Admiral has an excluſive juriſdiction in the firſt inſtance; but, where he has only a cumulative juriſdiction, as in mercantile cauſes, he cannot exerce any ſuch extraordinary powers: for it would be unreaſonable, that the purſuer, by chuſing to bring his action before that court, ſhould put the defender to greater hardſhips, than if the action had been commenced before the Judge-Ordinary, or Court of Seſſion. And he contended, That this cauſe was not maritime, but only mercantile; ſeeing the eſſence of the bargain or contract did not conſiſt in any thing to be done at ſea, or on ſhipboard, but conſiſted in the delivery of goods, for the price of which the ſuſpender might have been purſued before the Judge-Ordinary, or the Court of Seſſion.

*Anſwered* for *John Freeman* and Company: That the Judge-Admiral may, in all cauſes which come before him, oblige parties to find caution, *judicio ſiſti et judicatum ſolvi*; for he is intitled to obſerve the particular forms and privileges of his own Court in all cauſes. And,

2*dly*, The preſent caſe is properly maritime; for the bargain behoved to be implemented, by delivery of the goods *on ſhip-board*, before the ſuſpender was liable to pay the price; and whatever is contracted to be performed at ſea, or within the limits of the ſhore, can be judged of in the firſt inſtance by the Admiral alone.

*Obſerved* on the bench: That it is the practice of the Admiral-Court to grant orders, of courſe, in all caſes, to find caution *judicio ſiſti et judicatum ſolvi:* but, upon the defender's repreſenting to the Judge, that the cauſe is not maritime, ſuch order is in uſe to be recalled.

2*do*, That this cauſe was not maritime; for, tho' the goods were to be ſent by ſea to *Carolina*, yet the bargain had no connection with the ſea, no more than if the goods had been to be ſent to the ſuſpender at *Glaſgow*; in which caſe, the ſending them by land or water would have made no difference on the nature of the action, which the chargers would have had againſt the ſuſpender. B

" The Lords paſſed the bill without caution.

For the ſuſpender, *Lockhart*. For the chargers, *Ferguſon* & *Johnſtone*.

N° CXXIV. 9th *January* 1755.

*THOMAS FORRESTER* of *Dunnovan*, and other Freeholders of *Stirlingſhire*

againſt

*ANDREW FLETCHER* Eſq; younger of *Salton*, Lieutenant *JAMES CAMPBELL*, and *DAVID GOURLY* of *Kepdarroch*.

*ANDREW FLETCHER* younger of *Salton*, Lieutenant *James Campbell*, and *David Gourly*, were at the meeting for electing a member to ſerve in Parliament for the county of *Stirling*, on the 17th of *May* 1754, inrolled in the roll of freeholders.

*Thomas Forreſter* of *Dunnovan*, and other freeholders complained to the Court of Seſſion, and objected, That theſe three Gentlemen ought not to have been inrolled; becauſe the lands, under which they claimed right to vote, had lately been diſponed to them by Sir *James Livingſtone*, and *James Campbell* of *Ardkinglaſs*; and the diſpoſitions from Sir *James Livingſtone*, and *James Campbell*, in favour of the ſaid three Gentlemen, and the charters and ſaſines following thereon, contained a proviſo, That, ſo ſoon as they had compleated their titles to the lands, as immediate vaſſals to the Crown, they ſhould rediſpone the property of the lands, irredeemably in favour of their immediate authors, the ſaid Sir *James Livingſtone* in liferent, and the ſaid *James Campbell*, his heirs, *&c.* in fee, who were to hold the lands of the ſaid three Gentlemen, for a ſmall eluſory feuduty, and all the caſualties of ſuperiority to be taxed to ſmall eluſory ſums; and therefore it was evident their titles to the lands were nominal and fictitious, created only with a view to intitle to vote, contrary to the act *7mo Geo.* I. As the law preſently ſtands, a right of ſuperiority intitles to a vote; but, where that ſuperiority is, as in the preſent caſe, created on purpoſe to intitle to a vote, under an obligation of immediately rediſponing the property, and taxing the caſualties of ſuperiority to ſmall eluſory ſums, ſo that the ſuperiority can be of no value whatever: in ſuch a caſe, the right falls under both the words and meaning of the foreſaid ſtatute; and, agreeable to this, the Lords decided, 19th *June* 1746, Freeholders of *Kincardine*-ſhire againſt *Burnet* younger of *Craigie*.

*Anſwered* for the defenders: That the objection made their qualifications to vote, when duly attended to, reſolved into this, That a right of ſuperiority did not intitle to vote, which cannot be maintained; as by law, all the Crown's vaſſals, who have lands valued at *L.* 400, or upwards, are intitled to vote, without regarding whether theſe vaſſals have the *dominium utile*, or only the *dominium directum*, of the lands; and therefore the act *7mo Geo.* I. was never meant to ſtrike againſt ſuch qualifications: and the taxing the caſualties does not hurt their right to vote; as a ſuperior may lawfully tax, or even diſcharge, the caſualties of ſuperiority.

" The Lords repelled the objections made to the reſpondents qualifica-
" tions; and found them ſufficiently intitled to continue on the roll
" of Freeholders for the county of *Stirling*, and diſmiſſed the com-
" plaint."

B

Act. *J. Dundas, Bruce, & Cockburn.* Alt. *Lockhart, & J. Grant.* Clerk *Forbes.*

N° CXXV.

N° CXXV. *January* 10. 1755.

The Earl of *CRAWFURD*, and *HUGH CRAWFURD* Writer in *Edinburgh*,

againſt

*MARY URE*, and *DUNCAN GLASFURD*, her Huſband, for his Intereſt.

*JAMES URE* granted a general diſpoſition of all the goods and effects he had, or ſhould have at his death, failing children of his own body, in favour of the Earl of *Crawfurd* and *Hugh Crawfurd* equally; but the diſpoſition contained no nomination of executors.

*James Ure* died without leaving children; and, after his death, the diſponees obtained themſelves decerned executors-dative to him, before the Commiſſaries of *Edinburgh*.

After extracting the decreet-dative, but before expeding the confirmation, *Mary Ure*, the ſiſter of *James*, applied to the Commiſſaries by petition, praying, That ſhe might be confirmed as neareſt of kin, ſeeing the defunct had not named executors: the Commiſſaries reverſed the decerniture in favour of the diſponees, and preferred *Mary Ure*, as neareſt of kin, to the office of executor.

The diſponees complained, by a bill of advocation, to the Court of Seſſion; and *pleaded*, That as, by the diſpoſition, the goods to be confirmed belonged to them, they ought to have the adminiſtration of theſe goods, and were intitled to the office of executor preferably to the neareſt of kin, who had no intereſt in them.

*Anſwered* for *Mary Ure*: That, by the inſtructions to the Commiſſaries, they are appointed to prefer the neareſt of kin to the office of executor, when there is no executor nominated; and, agreeably to theſe inſtructions, the Court of Seſſion found the neareſt of kin preferable to a general diſponee, in a competition for the office of executor *anno* 1707, *Scot* of *Harden* againſt Lady *Harden*. It avails not to ſay, That it is improper to prefer the neareſt of kin to the office, when he behoved immediately thereafter, to accompt to the general diſponee for the whole effects; for the law has expreſsly made it as a rule, That the neareſt of kin is to be preferred to the office, when there is no executor nominated; and the neareſt of kin is intitled to judge whether the office be profitable for him or no; and, in many caſes, it may be profitable; for example, if he have grounds for reducing the general diſpoſition.

*Replied* for the general diſponees: That the plain meaning of the inſtructions to the Commiſſaries, is, to give the office of executor to the party who apparently has the preferable intereſt in the ſubjects to be confirmed; and, as the general diſponees have not only a preferable, but even an excluſive right, in a competition with the neareſt of kin, juſtice requires that they ſhould have the management of their own effects; for it would be abſurd to give the neareſt of kin the poſſeſſion of goods really belonging to another, or to intitle him to ſell them againſt the will of the diſponees, and make him only accountable for the apprized values, when perhaps they might yield more. By the inſtructions to the Commiſſaries, the neareſt of kin are only to be preferred, when there is no nomination or teſtament made by the defunct; and, under the word *teſtament*, a general diſpoſition may very properly be comprehended.

In

In the caſe of *Scot* of *Harden*, the neareſt of kin was alſo the defunct's heir, and the moveables aſſigned were bygone rents; and therefore he had an evident intereſt to apply for the office of executor, that he might have it in his power to protect his tenants, and prevent his lands from being thrown waſte by too rigorous diligence againſt the tenants: but, whatever the Court may have found whilſt it was held to be law, That the dead's part did not veſt in the neareſt of kin without confirmation, and that the confirming of a part did not tranſmit the whole; theſe deciſions can be no rule now, when the matter of confirmations, and of the transmiſſion of moveables from the dead to the living, are eſtabliſhed in a manner much more equitable than antiently obtained.

" The Lords remitted the cauſe to the Commiſſaries, with an inſtruction " to prefer the diſponees." B

Act. *Lockhart*, & *J. Dalrymple*. Alt. *Ferguſon*, & *And. Pringle*. Reporter, Lord *Juſtice Clerk*.

N° CXXVI. 17th *January* 1755.

*RALPH DUNDAS* younger of *Manner*

againſt

*WILLIAM CRAIG* of *Dalnair*.

AT the meeting for electing a repreſentative to Parliament for the county of *Stirling*, held 17th *May* 1754, *Ralph Dundas* younger of *Manner* preſented his titles, and craved to be inrolled amongſt the freeholders intitled to vote.

*William Craig* of *Dalnair*, one of the freeholders, *objected:* That he could not be inrolled; becauſe, altho' his charter was dated in *December* 1752, and his ſaſine dated the 12th, and regiſtred the 18th *January* 1753, yet the charter reſerved a faculty to *John Dundas* of *Manner*, the claimant's father, to alinate or burthen the lands diſponed without the claimant's conſent; and that the renounciation of that faculty was only dated and regiſtrated in *April* 1754; whereas, by the acts 12*mo Annæ*, and 16*to George* II. it ought to have been dated and regiſtred at leaſt one year before the day of election; this objection was ſuſtained by a majority of the freeholders.

*Ralph Dundas* complained to the Court of Seſſion, and *pleaded*, That the acts 12*mo Annæ*, and 16*to Geo.* II. did not exclude him from being inrolled; for it is only required by the firſt of theſe acts, That infeftment be taken, and the ſaſine regiſtred one year before the teſt of the writs for calling a Parliament; and, by the ſecond, one year before the inrollment; and that his ſaſine had been regiſtred much more than one year before the teſt of the writs, or day when the inrollment was claimed; and, as theſe acts were correctory laws, derogating from what was formerly the right of freeholders, upon their being infeft; they could not be extended beyond the letter of them, but behoved to be ſtrictly interpreted; and therefore could not be ſo conſtructed as to require, That, where a renounciation of reſerved powers was neceſſary for compleating the title to vote, ſuch renounciation behoved to be dated and regiſtred one year before the inrollment.

It

It is true, That, by another clauſe of the act 12*mo Annæ*, it is provided, That no redeemable rights, except proper wadſets, adjudications, or appryſings, allowed by the act 1681, ſhall intitle to vote; but, ſo ſoon as the right of redemption is extinguiſhed, the objection founded on this clauſe of the ſtatute is removed, it not being required that an year ſhould run between the extinction of the power of redemption, and the inrollment; and therefore, if one were infeft in lands, redeemable betwixt and a certain term, or upon a charter of adjudication which has a legal term for redemption, ſo ſoon as theſe terms are paſt, the perſon muſt be intitled to vote, ſuppoſing him formerly year and day infeft; becauſe there is nothing in the act to reſtrain him: and, in the ſame way, ſo ſoon as the perſon, who has reſerved powers over the fee, dies, or diſcharges theſe powers, the fiar is intitled to be inrolled, and to vote, providing that an year has run from the regiſtration of his infeftment.

And, as the words of theſe ſtatutes do not affect the complainer, ſo neither does the intention of them, which was to prevent an undue multiplying of votes on the approach of an election, of which there can be no hazard, by allowing a father, or other perſon, to renounce their reſerved powers in favour of the fiar.

*Anſwered* for *William Craig:* That the objection is founded on the words of the ſtatute, 12*mo Annæ*; for it is thereby enacted, " That no " conveyance or right whatſoever, whereupon infeftment is not taken, and " ſaſine regiſtrated one year before the teſt of the writs for calling a new " Parliament, ſhall, upon objection made in that behalf, intitle the perſon " ſo infeft to vote, *&c.*" Now, it is admitted, That the complainer's charter and infeftment by themſelves gave him no right to be inrolled; it was the renounciation alone that could give him ſuch a title; but he, not being infeft year and day upon that title, when he claimed to be inrolled, had no right to that privilege. The preſent caſe is quite different from that of an infeftment upon an adjudication, the legal of which has expired a ſhort time before the adjudger claims to be inrolled; for the expiry of the legal ariſes from the nature of the right itſelf, and not from any new right or conveyance.

And, as the intention of the ſtatutes was to prevent an undue multiplying of nominal votes upon the approach of an election, the complainer was, by the intention, as well as the words, juſtly excluded from the roll: otherways every man might create as many votes as his valuation would admit, by granting diſpoſitions with reſerved powers, and executing and producting renounciations of theſe powers on the very day of election.

" The Lords ſuſtained the objection made to the qualification of the " complainer, and diſmiſſed the complaint." B

Act. *And. Macdowal, J. Dundas, & Bruce.* Alt. *Lockhart, & J. Grant.* Clerk *Forbes.*

N° CXXVII. 17th *January* 1755.

*JOHN GALBRAITH* of *Balgair*

againſt

*WILLIAM CUNNINGHAM* of *Ballindalloch.*

AT the meeting of the freeholders of *Stirling*-ſhire, mentioned in the preceeding caſe, *John Galbraith* of *Balgair* claimed to be inrolled amongſt them, upon the following titles, *viz.* partly as heir to his brother in the lands of *Balgair*; for inſtructing of which, he produced his ſervice, dated 2d *March* 1753, a precept from the Chancery dated 17th *April*, and his ſaſine thereon, dated 3d *May*, and regiſtred 6th *June* ſaid year; and partly as proprietor of the lands of *Staneich* and *Rollis*; for evidence of which, he produced his charter of theſe lands, under the Great Seal, dated 23d *February* 1743, and ſaſine thereon, dated 4th, and regiſtred 7th *April* of that year; and he produced a certificate of the lands being valued in the ceſs-books at *L.* 410 : 10 : 8.

*William Cunningham*, one of the freeholders, *objected*, 1*mo*, That he could not be inrolled in virtue of the lands to which he had ſucceeded as heir to his brother, becauſe his right of apparency was at an end by his having made up titles; and he could not be inrolled in virtue of theſe titles, becauſe his ſaſine had not been regiſtred one year before the meeting for election. 2*do*, That he could not be inrolled in virtue of the lands to which he produced a charter and ſaſine, dated and regiſtred in 1743; becauſe his title to theſe lands was a redeemable right, but not a proper wadſet; for the contract contained no clauſe impowering Mr. *Galbraith* to call for his money. 3*tio*, That the valuation of the laſt mentioned lands, which had been purchaſed from Mr. *Stirling* of *Halbertſhire*, was not properly divided from the valuation of *Halbertſhire*'s other lands. The majority of the freeholders ſuſtained the objections; and *John Galbraith* complained to the Court of Seſſion for redreſs.

It was *pleaded*, in ſupport of the objections: That, by the act 12*mo Annæ*, and 16*to Geo.* II. none, except apparent heirs, can be inrolled, unleſs their ſaſines be recorded one year before the teſt of the writs for calling the Parliament, or at leaſt one year before the inrollment be demanded. Now, the complainer ceaſed to be an apparent heir, ſo ſoon as he compleated his titles to the lands; and he could not be inrolled on his titles, becauſe his ſaſine was not regiſtred one year before the diet for election, at which he claimed to be inrolled.

2*dly*, The complainer's right to the other lands is not a wadſet of any kind, but an actual ſale, under a power of redemption in favour of the ſeller; for the contract grants no power to the complainer to call for his money, which is eſſential to the nature of a proper wadſet; for a *jus crediti*, without a power of requiring payment, is incongruous and abſurd; and therefore his title to the lands, being a redeemable right, but not a proper wadſet, cannot intitle to a vote.

3*dly*, The diviſion of the valuation of the lands is erroneous in two reſpects: 1*mo*, The lands, belonging in property to Mr. *Stirling* of *Herbertſhire*, ſtand ſeparately valued from the lands belonging to his vaſſals, in the ceſs-book 1691 (which is the moſt antient and authentic valuation-book of the ſhire now extant;) and yet the Commiſſioners of Supply in dividing

dividing the valuations of the lands, whereof the ſuperiority had been diſponed or wadſet to the complainer, from the valuation of the other lands, blended the valuation of *Herbertſhire*'s property-lands with the valuation of his vaſſal's lands, as if they had been valued *in cumulo*. 2*do*, The Commiſſioners divided the valuation, not upon a proof of the real rent of the lands, but upon a proof of the uſe of payment of the ceſs to a private Collector, who paid in the whole to the Collector for the ſhire: but the uſe of payment of the ceſs could be no rule for dividing the valuation, becauſe the uſe of payment was without any legal authority, by conſent of parties alone, and could have been departed from by any of the parties when they pleaſed, and often bears no proportion to the real rent of the lands; and a proof of the real rents of the lands is the only legal rule for dividing the valued rent; for, were there no valuation of the lands, the ceſs behoved to be paid according to the real rents; and, when the valued rent of the lands, formerly valued *in cumulo*, is divided, it ought to be in an exact proportion to the real rents of the lands, whereof the valuation is divided.

It was *anſwered* for the complainer to the firſt objection: That the right which the law gives to one as apparent heir to his predeceſſor cannot be loſt thro' his compleating his titles by ſervice and infeftment. The law gives the privilege of being inrolled and voting to apparent heirs, not becauſe they are in a ſtate of apparency, but becauſe it appeared reaſonable, that they, upon their predeceſſor's death, ſhould have the ſame right to chuſe repreſentatives to Parliament which their predeceſſors had, altho' theſe heirs had not compleated feudal titles to the lands. The act 1681, when giving this privilege, had only occaſion to mention apparent heirs; becauſe, as the law then ſtood, ſo ſoon as one was infeft, even on ſingular titles, he was intitled to vote. And the act 12*mo Annæ*, does not take away this privilege, either from apparent heirs properly ſo called, or from heirs entered: it enacts, "That no conveyance or right whatſoever, "whereupon infeftment is not taken, and ſaſine regiſtrated one year before "the teſt of the writs, ſhall intitle to vote." But the complainer was not demanded to be inrolled and to vote in virtue of the right on which infeftment had been taken, but in virtue of the right which had been in his predeceſſor, and was now tranſmitted to him by his predeceſſor's death.

To the ſecond objection, it was *anſwered:* That a clauſe, impowering the wadſetter to call for his money from the reverſer was no way neceſſary to the conſtitution of a proper wadſet, as appears from Sir *George Mackenzie*'s definition of a wadſet, *tit. Redeemable Rights*, § 3. and § 12.; and that clauſe ſeems only to be a modern invention; for antiently wadſetters commonly got ſuch beneficial bargains, that they never called for, and ſeldom choſe to have their money offered to them; and, altho' *Craig* has a whole title, in his 2d book *De feudis*, upon wadſets, yet he makes no mention of any power in the wadſetter to call for his money, which, had it been neceſſary to the conſtituting of a wadſet, he certainly would have done. It is a miſtake to ſay, That a wadſet is a *jus crediti*; for it is a *jus dominii*, *Stair*, *tit. Wadſet*, § 2; and it is on that account that it gives right to vote.

To the third objection, it was *anſwered* in the general: That, as the diviſion of the valuation was made by a general meeting of the Commiſſioners of Supply, who are a commiſſion of Parliament, the freeholders

are

are not intitled to ſet aſide their decrees by exception, but their decrees muſt ſtand good until reduced by a proper proceſs.

And, more particularly, to the firſt part of the objection, *anſwered:* That, altho' the lands, which were *Herbertſhire*'s property-lands, at the time when the ſhire was originally valued, had been ſeparately valued from the lands then belonging to his vaſſals; yet the heritors of *Herbertſhire* have, ſince that time, feued out part of theſe property-lands; and it is not now certain what of the vaſſal's lands had been feued out before, and what after the ſaid valuation; and therefore the Commiſſioners of Supply behoved to add the two original valuations together, and then to divide the whole.

To the ſecond part of the third objection, *anſwered:* That the Commiſſioners of Supply are not confined to any particular mean of proof, but may uſe any proof that appears to them proper for the end in view; and the uſe of payment of the ceſs ſeems to be as proper a rule for dividing the valuation of the lands as any whatever; eſpecially when, as in the preſent caſe, that uſe has been for any conſiderable time, and is among feuers; for it is not to be preſumed, that any of the feuers would agree to pay a larger proportion of the ceſs than what effeired to the rent of the lands; as they could not thereby acquire a right to vote, becauſe not the Crown's vaſſals. And, as this uſe of payment was begun long ago, and when *Herbertſhire* was ſuperior of the whole lands, it could not be with a view to ſerve a turn, but in order that each vaſſal ſhould pay ſuch proportion of the ceſs as correſponded to the value of his lands.

" The Lords repelled the objections to the qualifications of the com-
" plainer, and ordained his name to be added to the roll of free-
" holders of the county of *Stirling*. B

Act. *And. Macdowal, & R. Bruce.* Alt. *Lockhart, & And. Pringle.* Clerk *Forbes.*

N° CXXVIII. 17th *January* 1755.

*PATRICK CAMPBELL* of *Monzie*

againſt

*JAMES CAMPBELL* of *Ardkinglas.*

AT the meeting for electing a Commiſſioner to Parliament from the county of *Stirling*, mentioned in the preceeding caſes, *Patrick Campbell* of *Monzie* claimed to be inrolled in the roll of the freeholders intitled to vote. His claim was founded, partly upon his right to the ſuperiority of certain lands, which had been diſponed to him by Sir *James Stirling*, and partly upon his right to certain feu-duties, payable out of the lands of *Bothkennar*, which had originally belonged to the abbacy of *Cumbuſkenneth*, and after the Reformation had been erected into a temporal Lordſhip, to which feu-duties, Mr. *Campbell* of *Monzie* had acquired right.

It was *objected* by *James Campbell* of *Ardkinglaſs*, one of the freeholders, That Mr. *Campbell* of *Monzie* was not intitled to be inrolled; *1ſt*, becauſe he was not infeft in either the property or ſuperiority of the lands, out of which the feu-duties were payable; for the vaſſals in theſe lands had taken the benefit of the acts of annexation, and held their lands immediately

diately of the Crown: ſo that they were not vaſſals to the claimant, who, by his charter, had no other right than that of uplifting the feu-duties; which could no more intitle to a vote, than a perpetual annuity upliftable forth of lands. 2*dly*, That the valuation of thoſe lands purchaſed from Sir *James Stirling* had not been properly divided from the original valuation *in cumulo* of the lands of *Glorat*, whereof they were a part; as the Commiſſioners of Supply had not taken a proof of the real rent of the lands, but only of the uſe of payment of the ceſs.

The majority of the freeholders ſuſtained the objections; and Mr. *Campbell* of *Monzie* complained to the Court of Seſſion, and pleaded, for obviating the firſt objection, 1*mo*, That he was the Crown's vaſſal in theſe feu-duties, and that "they were liable in public burdens for his Majeſty's "ſupply;" and as their valuation, joined to the valuation of the Complainer's other lands, is above *L.* 700 *Scots*, he was, in terms of the act 1681, intitled to a vote. Theſe feu-duties were the rents of the lands at the time when the lands were feued out; the Complainer is intitled to uſe a poinding of the ground for payment of them, and has a preferable right in the lands to the vaſſals, who have only right to the new or improved rent, after the feu-duties or old rent is paid.

2*do*, That the act 1681 ought to be beneficially interpreted, ſo as to comprehend every heritable ſubject holding of the Crown, and liable in payment of public burdens, tho' theſe ſubjects ſhould not be lands in the ſtrict ſenſe of the word, as it is for the advantage of the conſtitution that all the property in the kingdom be repreſented in Parliament, and that thoſe who bear the burden of the taxes ſhould have a ſhare in laying them on; and as theſe feu-duties in *Scotland*, which formerly belonged to churchmen, amount to about *L.* 60,000 *Sterling* yearly, it would be very improper to exclude the proprietors of them from a repreſentation in Parliament.

3*tio*, The Court of Seſſion has in many inſtances interpreted the words of the act 1681 more extenſively than is now contended for. Thus, 29th *January* 1745, Sir *Patrick Dunbar contra Sinclair* of *Bremſter*, it was found, That one infeft in teinds holding of the Crown, was intitled to vote upon their valuation, altho' teinds fall but very improperly under the denomination of lands, and are rather a ſervitude on the lands; and are not *debitum fundi*, as theſe feu-duties are, but only *debitum fructuum*. And, 10th *July* 1745, Freeholders of *Aberdeen-ſhire contra Fordyce* of *Monkshill*, and Freeholders of *Dumbarton-ſhire contra Campbell* of *Succo*, a right of ſalmon-fiſhing was found to intitle to a vote: in the former of which caſes the claimer had no right to the adjacent lands; and as the extenſion in the above caſes was moſt juſt, becauſe the teinds and fiſhings were rights holden of the Crown, and liable in public burdens for his Majeſty's ſupplies, ſo the act ought alſo to be extended ſo as to comprehend the ſaid feu-duties; for, as *Cicero* obſerves, *Valeat æquitas quæ paribus in cauſis paria jura deſiderat.*

It was *anſwered* for *James Campbell* of *Ardkinglas*, That it appears from our ancient acts of Parliament, that none but proprietors of lands were obliged to give attendance in Parliament; and from our later ones, that none but ſuch proprietors were intitled to elect repreſentatives to Parliament; particularly the acts 1681, and 16*to Geo.* II. (which are now the rule), expreſsly mention *lands holden of King or Prince*. The Complainer's right to the feu-duties, is undoubtedly no right to lands either in property

or ſuperiority. The right in his charter is thus deſcribed. *Et ſimiliter omnes et ſingulas feudifirmæ divorias ſubtus ſpecificat. ſolubiles ex terris poſtea mentionat. pertinen. ad perſonas poſtea mentionat. feudifirmarios et portionarios de Bothkennar reſpectivè, &c.* and the vaſſals who are the proprietors of the lands, hold them immediately of the Crown, and not of the Complainer; and therefore this right to the feu-duties can no more intitle to vote, than a perpetual annuity or annualrent could; for it is not the paying of ceſs, but the holding lands of the Crown that intitles to vote. And however proper the Complainer's arguments for extending the act 1681 ſo as to comprehend his caſe, might be before the legiſlature; yet they can have no place in a court of law, which muſt decide according to the words of the law, without regard to conſiderations of expediency. If the Court has already extended the law ſo as to comprehend ſubjects not directly falling under it, that is no reaſon for their extending it farther to other ſubjects. But the caſes mentioned by the Complainer were no undue extenſion; for, in the caſe of Sir *Patrick Dunbar contra Sinclair*, it was only found, that the valued rent of the teinds to which the proprietor of the lands had acquired right, might come *in computo* with the valuation of the lands; and juſtly; for when the proprietor of the lands had acquired right to the teinds, they ceaſed to be a ſervitude or burden on the lands, and the lands became liable for the whole valuation of both the ſtock and teind. But it never was found, that a titular of the teinds of other men's lands was intitled to vote, where the valuation of the teinds exceeded *L.* 400 *Scots*. And a right of ſalmon-fiſhing falls properly under the deſcription of lands, becauſe, by the common principles of law, the channel of a navigable river, as well as all the emoluments and advantages ariſing from the river, are conſidered as part and pertinent of the adjacent grounds.

The arguments with reſpect to the manner of dividing the valued rent, were the ſame with thoſe uſed in the caſe immediately preceeding.

" The Lords repelled the objections to the Complainer's qualification, " ſo far as concerned the diviſion of the valuation of the lands deri- " ved from Sir *James Stirling*; but ſuſtained the objection made to " that part of the qualification founded upon the title to the feu- " duties payable out of the lands of *Bothkennar*; and therefore diſ- " miſſed the complaint."

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Act. *And. Macdouall, Ro. Dundas, & Bruce.* Alt. *Lockhart & And. Pringle.* Clerk, *Forbes.*

N° CXXIX. 17th *January* 1755.

*JOHN BUCHANAN* of *Carbeth*.

againſt

*WILLIAM CUNINGHAM* of *Ballendalloch*.

AT a meeting of the freeholders of *Stirling-ſhire* for chuſing a repreſentative to Parliament, mentioned in the preceeding caſes, *John Buchanan* of *Carbeth* claimed to be inrolled in the roll of freeholders intitled to vote, partly as being the Crown's vaſſal in the lands of *Little-Carbeth* and others, and partly as having right to certain feu-duties payable out of the lands of *Bothkennar*.

It

It was objected by *William Cuningham* of *Ballendalloch*, one of the freeholders, That he could not be inrolled, 1*mo*, Becauſe the date of the writ for calling the Parliament was 9th *April* 1754, and the inſtrument of ſaſine in favour of the claimant is only regiſtrate 27th *April* 1753, which was not one year before the date of the writ; and, by an act of the 12th of Queen *Anne*, it is ſtatuted, "That no conveyance whereupon infeft-"ment is not taken and regiſtrate one year before the teſt of the writ for "calling a new Parliament, ſhall, upon objection made in that behalf, in-"title the perſon ſo infeft to vote or be elected." 2*do*, That a right to the feu-duties of *Bothkennar*, being neither a right to the property or ſuperiority of the lands, did not intitle to vote.

A majority of the freeholders ſuſtained both the objections. Mr. *Buchanan* complained to the Court of Seſſion, and pleaded in anſwer to the firſt objection, that by an act of the 16th of his preſent Majeſty it is enacted, "That no purchaſer ſhall be inrolled till he be publicly infeft, and his ſaſine "regiſtrated one year before his inrollment:" from which it is evident, that it is only neceſſary that the inſtrument of ſaſine be regiſtrated one year before the inrollment be demanded, which it was in this caſe; and as *poſteriora derogant prioribus*, the act of the 12th of Queen *Anne* is in ſo far repealed.

*Anſwered* for *William Cuningham*, That the maxim, *Poſteriora derogant prioribus* only takes place where the two things enacted by different ſtatutes are incompatible: but here they are not; for the clauſe in the firſt act reſpects the right of voting and being elected, and the clauſe in the ſecond act reſpects only the privilege of being inrolled; and had not another objection ſtood in the way, the freeholders would have inrolled the Complainer at the ſaid meeting, after the election of the member of Parliament was over; and tho' he had been inrolled before the election, he could not have voted, becauſe the act of the 12th of the Queen debarred him from that privilege: and it is the leſs to be ſuppoſed that the foreſaid clauſe of the laſt act repealed the ſaid clauſe of the former act, becauſe one clauſe of the ſaid former act is expreſsly repealed by the act of the 16th of the King, which is a virtual confirmation of all the other clauſes.

*Replied* for the Complainer: That the clauſe of the act of the 16th of the King implies a repeal of the clauſe of the 12th of the Queen, upon which the objection is founded: for all that is required by the act of the 16th of the King, is, That the Claimant be year and day infeft before he be inrolled, and ſo ſoon as he is inrolled, he is intitled to vote, as appears from other parts of the ſaid ſtatute. Now ſuppoſe that the writ for calling a Parliament bore date the 20th *September*, and that a freeholder was infeft the 25th day of *September* of the year preceeding, and duly entered his claim for being inrolled two kalendar months before *Michaelmaſs*, and appeared at the *Michaelmaſs* meeting, and was inrolled, and the meeting for election was upon the 10th of *October* thereafter; it is obvious, that ſuch freeholder's name behoved, by the act of the 16th of the King, to be called and his vote marked, in every queſtion during the courſe of the election, the act of the 12th of the Queen notwithſtanding; and therefore that act is in ſo far repealed.

The arguments upon the ſecond objection were the ſame with thoſe mentioned in the preceeding caſe.

"The Lords repelled the firſt objection, and found that it was not ne-"ceſſary, that the Complainer's infeftment ſhould have been dated "and regiſtrated one year before the teſt of the writ for calling the "Parliament;

" Parliament; but that it was ſufficient his infeftment was dated and
" regiſtrated one year before the day upon which he craved to be in-
" rolled. But they ſuſtained the ſecond objection, and therefore diſ-
" miſſed the complaint." B

Act. *And. Macdowal, Ja. Dundas, & Bruce.* Alt. *Lockhart, And. Pringle & Jo. Grant,* Clerk, *Forbes.*

N° CXXX. *January* 17. 1755.

Mr. *JOHN CALLENDAR* of *Craigforth* Advocate

againſt

Mr. *ROBERT BRUCE* of *Kennet* Advocate.

THE Defender was inrolled in the roll of freeholders of the county of *Stirling*, at their *Michaelmaſs* meeting 1753.

The Purſuer, one of the freeholders, complained, and made ſundry objections againſt the decreet of the Commiſſioners of Supply dividing the valuation of the Defender's lands from the valuation of the barony of *Kerſe*, of which they were a part.

The Defender admitted, that the Commiſſioners had not proceeded ſo regularly in the diviſion of his valuation; but repreſented that, ſince giving in of the complaint, a general meeting of the Commiſſioners of Supply had made a new diviſion of the valuation of the whole barony, and offered to produce an extract thereof, by which it would appear, That none of the Purſuer's objections, nor any other objection, lay againg this new diviſion; according to which the valuation of the Defender's lands exceeded *L.* 400 *Scots*: That the Defender had been inrolled without any objections offered to the meeting againſt his inrollment; and that he was, at the time of the inrollment as well as now, the Crown's vaſſal in lands of the valuation required by law; ſo that the meeting did right both formally and materially when they inrolled him; and therefore he ought to continue on the roll.

*Anſwered* for the Purſuer: That none are intitled to be inrolled, unleſs they produce to the meeting legal evidence that their lands are valued at or above *L.* 400 *Scots*; and, as the Defender did not produce to the meeting legal evidence of the valuation of his lands, he was not intitled to be inrolled, and cannot continue upon the roll in virtue of that inrollment, altho' he may be intitled to be inrolled by an after-meeting, upon producing proper titles.

" The Lords ſuſtained the objection, and found, That it was not now
" competent to ſupply the errors or defects in the diviſion of the valu-
" ation made before the inrollment, ſo as to validate the inrollment
" thereon; and therefore ordained the Defender to be expunged from
" the roll, reſerving to him to apply for being inrolled upon any new
" regular diviſion of the valuation." B

Act. *Lockhart & And. Pringle.* Alt. *Ja. Dundas.* Clerk, *Forbes.*

N° CXXXI.

N° CXXXI. *January* 24. 1755.

## *WILLIAM CRAWFURD*

against

## *THOMAS MACFIE.*

*WILLIAM CRAWFURD*, in conſideration of 7000 merks to be paid by *Thomas Macfie*, became bound to convey to him the haill principal ſums, annualrents and penalties due to *Crawfurd* by *Wallace* and *Morton*, with his haill grounds of debt and diligence, perſonal and real, affecting their heretable and moveable ſubjects.

Among the debts thus agreed to be conveyed was a bond for 700 merks due by *Wallace* and *Morton*, to which *Crawfurd* had right, or which adjudication had followed. *Crawfurd* produced the adjudication, but he did not produce the bond.

*Macfie* claimed deduction, to the amount of this bond, from the 7000 merks he had obliged himſelf to pay to *Crawfurd*.

*Crawfurd*, charged for his whole ſum, and offered to prove, *prout de jure*, That at the time of the tranſaction *Macfie* was in the knowledge the bond in queſtion was loſt, and therefore could not expect to have it delivered to him.

*Macfie* ſuſpended, and *anſwered*, the alledgeance was not probable *ſcripto aut juramento*; for the import of it was, to take away the effect of a writing, to wit *Crawfurd*'s obligation to convey the whole debts with the diligences on them; and that could not be done by a proof *prout de jure*.

"The Lords allowed a proof of the alledgeance *prout de jure*." J D

Act. *Arch. Hamilton & Millar.* Alt. *J. Dalrymple.*

N° CXXXII. 31ſt *January* 1755.

## Lord *CATHCART*

against

## *JOHN STEWART NICHOLSON SCHAW.*

IN the contract of marriage betwixt *John Schaw* younger of *Greenock*, and *Margaret Dalrymple anno* 1700, Sir *John Schaw* the elder, and *John* his ſon the younger, concurred in making a ſettlement of the eſtate of *Greenock*, on the heirs male of the body of *John* the younger; after which the heirs male of Sir *John*, and the heirs of the body of his daughter *Margaret* were preferred to the heirs female of *John*.

This ſettlement was executed in the form of an entail, which contained prohibitive, irritant and reſolutive clauſes, in the ſtricteſt words, againſt ſelling or charging, or altering the order of ſucceſſion; and a proviſion, with a penalty annexed to the contravention of it, That the *heirs of tailzie ſhould not ſuffer the duties of ward, marriage, or relief, nor the feu blench, nor teind-duties, nor other public burdens, payable forth of the ſaid tailzied lands, by the not payment whereof, the ſame may be evicted to run on unſatisfied.*

In the faculty to contract debt, a power was given the heirs to contract 50,000 merks *Scots money of debt*, and therewith to affect and burden the ſaid lands, for providing of their daughters, or younger children; but it was declared, that it ſhould not be lawful to any of the ſucceeding heirs of tailzie to contract any more debts, for proviſion of their children, until firſt the debts contracted by their predeceſſors, for proviſion of their children, be paid and cleared; *at leaſt that it ſhould be only lawful for them to contract ſo much, for the end foreſaid, as, with the predeceſſor's debt above ſpecified unpaid, ſhould amount to* 50,000 *merks in the whole*; and that the adjudications led therefor ſhould always be redeemable, upon paying the ſums for which the ſame ſhould be obtained, *with the annualrents thereof.*

A proviſion was likewiſe made for the daughters of the marriage in caſe of heirs male of the marriage: in that event, the father and ſon bind *themſelves, their heirs male, and of tailzie*, to pay to the daughters of the mariage, if there be only one daughter, the ſum of 30,000 merks for her portion; if two daughters, 40,000 merks; if more than two, the above ſum of 50,000: which proviſions are declared to exhauſt the above faculty of contracting debt, in ſo far as they are exerciſed: and which portions ſhall be payable to the ſaid daughters, at their ages of 16 years compleat, or at their marriages, which of them ſhall firſt happen, together with the *annualrents of the ſaid portions continually, during the non-payment thereof*, after the ſeveral terms of payment above mentioned. And they further bond themſelves, *&c.* to free the daughters of all debts that may affect them, as heirs of line to their father. The faculty to contract, or the proviſions in exerciſe of it being declared to be a burthen on the entailed eſtate, and the heirs of tailzie being bound to relieve Sir *John*'s heirs of line, of the debts ſo contracted or ſums ſo provided.

Proviſo in caſe of the ſecond marriage of Sir *John*, or any other heir of entail, he or they may provide a ſecond wife in a jointure, not exceeding a fourth of the free rent of the eſtate, at the time, *the annualrents of children's portions*, &c. *being firſt diſcounted.*

Separate proviſo, that the preſent tailzie, and *irritancies thereof, are to be no ways prejudicial to any execution competent on this contract, in ſo far as the ſame is conceived in favours of Margaret Dalrymple, and the daughters of the marriage*, failing heirs male thereof.

In *March* 1718, *John* the younger then become Sir *John*, in the contract of marriage betwixt his only daughter *Marion Schaw* and Lord *Cathcart*, obliged himſelf to grant bond to Lord *Cathcart* for 50,000 merks, payable by him, and his heirs ſucceeding to him in the eſtate of *Greenock*, within a year and day after the marriage, with annualrent and penalty; and alſo to grant an heritable ſecurity for the ſaid 50,000 merks, on the lands of *Greenock*, obliging his heirs of tailzie to relieve his other heirs of theſe ſums, *annualrents*, and penalties, which ſhould happen to be due at the time of his death. This obligation proceeded on a recital of the reſerved faculty in the entail 1700, of burdening the eſtate with 50,000 merks; and of the proviſion by the ſame ſettlement ſecured to the daughters, excluded from the ſucceſſion.

On the 2d of *September* 1718, Sir *John* granted bond to Lord *Cathcart* for 30,000 merks, in ſatisfaction of this proviſion.

The day after, he granted two other bonds to Lord *Cathcart*, making together the ſum of 20,000 merks, in exerciſe of that faculty.

In

In both theſe bonds Sir *John* binds *himſelf*, and the heirs *ſucceeding him in the entail of Greenock*; they are made payable at the next term after their date; annualrent is made due upon them, from the date of the marriage; in both of them Sir *John* binds his heirs of tailzie to relieve his other heirs, of the ſums, principal, and annualrents, and penalties; and in both of them Sir *John* binds himſelf to infeft Lord *Cathcart* in an *annualrent* effering to theſe ſums, out of the barony of *Greenock*; and for that purpoſe, an aſſignation to the rents, for ſatisfaction of the annualrent, is therein granted to Lord *Cathcart*.

From the time of Lord *Cathcart*'s marriage, till the death of Sir *John*, which happened *anno* 1752, Sir *John* paid none of the annualrents either of the 30000 merks bond, or of the two bonds, making together 20000 merks granted by him to Lord *Cathcart*.

*Margaret Dalrymple* Lady *Shaw* ſurvived Sir *John*.

Upon Sir *John*'s death, *John Stewart Nicholſon*, the deſcendant of *Margaret Shaw*, and heir of entail to Sir *John*, purſued Lord *Cathcart* ſon of the marriage 1718, and heir of line to Sir *John*, to be relieved of the bygone annualrents of the 50000 merks for which Lord *Cathcart* was creditor upon the entailed eſtate.

*Pleaded* for the purſuer: An heir of entail has only a liferent-right to the eſtate: he is under a fiduciary obligation to tranſmit the eſtate to his ſucceſſor in as good condition as it was at the time when he came to it; if he counteracts this obligation, the next heir has an action of relief for damages againſt his repreſentatives.

This was the intention of parties in the preſent entail; for that the faculty to contract debt, in limiting the ſum, declares that no heir ſhall contract more debt than, added to his predeceſſors debt, ſhall amount to 50,000 merks in whole.

In caſe of Sir *John's* ſecond marriage, or of that of any heir of entail, the extent of the wife's jointure is to be a fourth of the free eſtate; but the eſtate is to be computed only free, after deduction of the annualrent of the younger children's portions, which ſuppoſes that theſe annualrents were every year to be paid out of the eſtate.

In Lord *Cathcart*'s contract of marriage, the bonds are payable at next term. Sir *John* binds himſelf perſonally; annualrent is due from the date; Lord *Cathcart* was infeft in an annualrent effering to his debts, and had an aſſignation to the rents for payment of his annualrents: all theſe things ſhow the meaning of parties, that the annualrents were to be regularly paid.

*Separatim*, With regard to the 30,000 merks. By the entail 1700, the ſum allotted to an only daughter is not to be paid in all events, but merely on the contingency of Sir *John Shaw*'s dying without iſſue-male: whether that event would or would not happen, was uncertain in the 1718, and continued ſo till his death, his Lady having ſurvived him; and therefore the eſtate could not be charged with this debt, and the annualrents on it, from the 1718, the date of Lord *Cathcart*'s marriage.

*Anſwered* for Lord *Cathcart*: An heir of entail is not a tenant for life, but an abſolute proprietor, except in ſo far as he is reſtrained by expreſs limitations; where he infringes not theſe, altho' he hurts the next heir, no action of damage is competent; as if he commits waſte, by cutting the woods, not cultivating the ground, or ſpoiling the mines.

Where

Where it is the intention of parties to oblige the heirs to keep down the debts by paying the intereſt, it is uſual in tailzies to inſert anxious clauſes for that ſpecial purpoſe.

It was not the intention of parties here, that the annualrents ſhould be regularly paid; for tho' it is provided, that no heir of tailzie ſhould ſuffer the duties of ward, non-entry, nor any public burdens to run on unſatisfied; yet it does not provide, that no heir of tailzie ſhould allow the annualrents of the debts to run on unſatisfied.

The faculty to contract impowers the heir to contract 50,000 merks of debt, and therewith to affect and burden the lands; that is, he was to borrow 50,000 merks, and lay it as a burden on the eſtate; which implied, that both principal and annualrent ſhould be a burden thereon.

In providing for the redemption of adjudications led for that debt, it makes mention of the annualrents thereof.

In the proviſion to the daughters of the marriage, the portions are payable at a certain period, with the annualrents of the ſaid portions continually during the non-payment thereof.

In Sir *John Shaw*'s contract of marriage 1700, the father and ſon bind themſelves, and their heirs of tailzie, to liberate the daughters of the marriage of all debts which might affect them as heirs of line: in conſequence of this, in Lord *Cathcart*'s contract of marriage 1718, Sir *John* binds his heirs of tailzie to relieve his other heirs of the ſaid ſum of 50,000 merks, with the annualrents due at his death; in all the bonds he does the ſame. All which ſuppoſes that the heirs of tailzie were to be liable for the whole principal and annualrents, without relief of the daughters as heirs of line.

*Separatim*, With regard to the 30,000 merks. As it is declared, that the tailzie, and irritancies thereof, are not to be prejudicial to the execution competent to the daughters for their proviſions, the eſtate was ſo far unentailed and free of irritancies. Now, if there had been no tailzie, there can be no doubt the eſtate would have been ſubject to the annualrents, as well as to the principal ſums.

" The Lords found the Purſuer is not intitled to any relief againſt the
" Defender, as heir of line of Sir *John Shaw*, of the annualrents of
" the 30,000 merks contained in the heritable bond produced, grant-
" ed by Sir *John Schaw* to the late Lord *Cathcart*, in implement of
" the obligation in the contract of marriage to pay that ſum to the
" only daughter in the marriage; but found the Purſuer is intitled to
" relief againſt the Defender, contained in the two bonds produced,
" granted by Sir *John Schaw* to the Defender, in exerciſe of the fa-
" culty contained in the entail, and incurred during the life of Sir
" *John Schaw*."

By the entail 1700. Sir *John Schaw* having reſerved power to the heirs of entail to grant feus, the feu-duty not being under a certain extent for each fall of dwelling-houſes, nor under another certain extent for each fall of office-houſes; Sir *John* had granted a feu of the Town of *Greenock* to Lord *Cathcart*. In this feu there were ſeveral clauſes, which produced the following objections.

*Objected:* By this feu the Defender is freed from thirlage, tho' the entail conveys, along with the barony, the mills and multures thereof, and tho' the heir of entail ſupports the mill; From paying duties at the harbour, tho' the harbour is entailed, and the heir of entail ſupports it; From miniſters ſti-

pends,

pends, ceſſes, and all public burdens whatever, which are natural burdens upon feus. He is freed from the legal irritancy *ob non ſolutum canonem*, and the duplication of the feu-duty upon the entry of heirs. The compoſition due by a ſingular ſucceſſor is taxed to a trifle.

The defender is obliged to pay only one pound *Scots* for all ground he may hereafter gain of the ſea.

*Anſwered* for Lord *Cathcart:* Before the entail, Sir *John* was abſolute fiar of his eſtate, he had a power to feu as he pleaſed; in the entail, he reſerved a power to feu under a limitation, That the feu-duty ſhould be of a certain extent: he has obſerved, That limitation, and his original power in other reſpects, was the ſame as before the entail.

The *littus maris* is *juris publici*, it belongs to no body; and therefore cannot be deemed a part of the intailed eſtate.

" The Lords repelled the reaſons of reduction of the feu-right of the " town of *Greenock*."

In the entail 1700, Sir *John Shaw* having reſerved a power to the heirs of entail to ſet tacks for 19 years, without diminution of the rental, Sir *John* had ſet a tack to Lord *Cathcart* of the weſtern barony of *Greenock* at the real rent.

Againſt this tack it was *objected* by the purſuer: At the commencement of the tack, many of the tenants had tacks for terms then current; whereas the intention of the entail was to impower the heirs only to ſet the farms that were unſet.

2*do*, By the tack, the defender is not obliged to uphold the houſes, but only, at his removal, to leave ſuch as ſhall be then ſtanding in as good condition as they were at his entry.

*Anſwered* to the *firſt:* The tailzie allows the ſetting tacks for a certain ſpace without diminution of the rental, the preſent is no more than a tack of the tack-duties, ſuch tack is good in law; and whatever was the intention of the entail is within the terms of it.

To the *ſecond:* By the entail, the heir was bound to nothing, except not to ſet under a certain rent; and there is no law which binds an heir of entail to uphold the houſes on the eſtate.

" The Lords repelled the reaſons of reduction as to this tack."

Sir *John* had likewiſe given to Lord *Cathcart* a tack of the manſion-houſe, gardens, and pleaſure-ground round the houſe.

*Objected* by the purſuer: Theſe could not be ſet to preclude the heir of entail from the poſſeſſion of his family-ſeat.

*Anſwered:* The greateſt part of the houſe had been built, and the greateſt part of the pleaſure-ground laid out by Sir *John* himſelf.

*Replied:* Theſe follow the ground by whoever built or planted, and cannot be taken out of the poſſeſſion of the next heir of entail.

" The Lords ſuſtained the reaſons of reduction as to theſe."

Sir *John* had, by contract of ſale, ſold to Lord *Cathcart* all the growing timber, both planted and natural, on the eſtate, with liberty to him to cut it, at any time before the year 1763.

The planted timber was fit for cutting, the natural wood was not.

This contract was not produced till Sir *John*'s death.

*Objected* by the purſuer: Sir *John*'s right to the eſtate ended with his life: with the eſtate, the trees muſt deſcend to the heirs of tailzie; for, as they could not have been cut by Sir *John*'s executors, ſo neither could they be cut by the purchaſer.

Whatever may be the power of an heir of entail over ſuch natural woods as are ripe for cutting, that power will not apply to ſuch part of the natural woods in queſtion as are not ready for cutting.

*Anſwered* in queſtions betwixt heirs and executors: Trees being fixed to the ground, are conſidered as *pars ſoli*, and, of conſequence, heritable; but, by a ſale, the property is transferred; of conſequence, the trees remain no longer part of the entailed eſtate; the ſeller's death happening afterwards cannot annul the right of the purchaſer.

Sir *John*'s power is the more favourable, that the planted wood had all been planted by himſelf, ſince the date of the tailzie.

" The Lords found none of the planting (*i. e.* planted trees,) could be " cut by the defender, in virtue of the contract of ſale, produced af- " ter the death of Sir *John Shaw*; and, in reſpect it is alledged by " the purſuer, and not denied by the defender, That the natural " woods, ſold by ſaid contract, were not fit for cutting at Sir *John* " *Shaw*'s death, therefore ſuſtained the reaſons of reduction of ſaid " contract." *Affirmed.* J. D.

Act. *R. Dundas, W. Stuart, et alii.* Alt. *Ferguſon, Brown, et alii.*

N° CXXXIII. 1ſt *February* 1755.

*EDMUND BRADSHAW* and *GEORGE ROSS*

againſt

*ADAM FAIRHOLME* and others.

CAPTAIN *Alexander Wilſon* of *London*, banker, was a native of *Scotland*, but had fixed his reſidence in *England*; on the 15th of *February* 1751, he ſtopt payment; on the 24th of *November* 1751, a commiſſion of bankruptcy was iſſued againſt him; and, on the 24th of *February* 1752, he was found to have been a bankrupt from the 15th of *February* 1751. *Bradſhaw* and *Roſs* were choſen aſſignees under the commiſſion of bankruptcy, and the whole effects of the bankrupt were conveyed to them.

In *February* 1751, but poſterior to the 15th of that month, *Fairholme* and others, creditors of *Wilſon*, raiſed horning on their grounds of debt, and uſed arreſtments in the hands of certain debtors of *Wilſon*; the debtors were either officers in the army, not natives of *Scotland*, but on duty in *Scotland*, or natives of *Scotland* then reſiding there, or natives of *Scotland* having no reſidence there; againſt the laſt, arreſtment was uſed at the market-croſs of *Edinburgh* and pier and ſhore of *Leith*.

The debts due by the arreſters were all moveable debts, conſiſting of bonds granted and made payable in *England*.

*Fairholme* and the other arreſters inſiſted, in actions of forthcoming, againſt the arreſtees; appearance was made for the aſſignees under the commiſſion of bankruptcy, and a competition enſued between them and the arreſters.

*Pleaded* for the aſſignees under the commiſſion: the *lex loci contractûs* muſt determine the conſtitution, transference, and defeaſance of contracts; the debts in queſtion were contracted in *England*; the bonds for them were taken

taken in the *Engliſh* form, made payable in *England*, where alſo the creditor reſided; the debts are therefore to be conſidered in every view as *Engliſh* debts. As ſuch, they were, from and after the 15th of *February* 1751, fully veſted in the legal aſſignees under the commiſſion of bankruptcy, and could not be affected by any poſterior diligence uſed againſt the bankrupt. See act *1mo James* I. *c.* 15. § 13.; and the caſe *Philips verſus Thomſon*, *Levinz's Reports*, *part.* iii. *p.* 191.; and the caſe *Kidwell verſus Player*, *Salkeld's Reports*, *vol.* i. *p.* 111.: from all which it follows, that the legal aſſignees muſt be preferred.

*Pleaded* for the arreſters; The ſolemnities requiſite in a contract may be regulated by the *lex loci contractûs*; but the execution of legal diligence againſt the debtor, on ſuch contract, muſt be regulated by the law of that country, to whoſe juriſdiction the debtor is ſubject, and within which the diligence is uſed.

The commiſſion of bankruptcy ſuperſedes all diligence which might have iſſued from the Courts in *England*, againſt the effects or debtors of the bankrupt, within the juriſdiction of theſe courts; but it is incongruous to ſuppoſe, That the operation of this commiſſion can extend itſelf to effects or debtors of the bankrupt, within the juriſdiction of another country. The juriſdiction of the Courts in *Scotland* extended both to Captain *Wilſon*, and to the bonds arreſted: as therefore the arreſters have uſed compleat diligence, according to the law of *Scotland*, prior to the aſſignation, they muſt be preferred to the aſſignees.

" The Lords preferred the aſſignees under the commiſſion of bank-
" ruptcy, with reſpect to the *Engliſh* debts, that is, the debts con-
" tracted after the *Engliſh* form, or payable in *England*." D

For the legal aſſignees, *J. Craigie*, *A. Pringle*, & *Advocatus*. Alt. *Miller*, & *Ferguſon*. Reporter, *Juſtice Clerk*.

*N. B.* Other queſtions occurred in this caſe, *viz.* *1mo*, As to the effect of an arreſtment of *Engliſh* debts, uſed in the hands of perſons not natives of *Scotland*, but caſually reſiding there. *2do*, As to the effect of arreſtments uſed at the market-croſs of *Edinburgh* and pier and ſhore of *Leith*, againſt natives of *Scotland*, reſiding in other countries. *3tio*, Whether a perſon born in *Scotland*, but who had fixed his reſidence in another country, remained perpetually liable to the juriſdiction of the Courts in *Scotland*, *ratione fori originis?* But the Court ſeemed to wave the conſideration of theſe queſtions, and to give judgment on this ground, That the bonds arreſted were to be conſidered as *Engliſh* debts.

N° CXXXIV. 7th *February* 1755.

Doctor *PARK*

againſt

Repreſentatives of *LANGLANDS*.

DOCTOR *Park*, ſon-in-law to *Langlands*, purſued his repreſentatives for furniſhings and attendance, as Surgeon and Phyſician to the defunct's family, during many years, and, particularly, for his own attendance

dance on *Langlands*, during his laſt ſickneſs, which laſted for above ſeven months.

Among other things, *objected* by the repreſentatives: That, with reſpect to the fees ſtated for attendance as a Phyſician, theſe are preſumed paid at the time of the attendance, except for the attendance of the laſt ſixty days in the deathbed-ſickneſs, according to a deciſion marked in the *Dictionary*, *vol.* ii. *p.* 140. Doctor *Ruſſel* againſt Sir *James Dunbar*; and according to the reaſoning in two other deciſions, marked there *Johnſton* againſt *Bell*; and *Mackenzie* againſt town of *Bruntiſland*.

*Anſwered* for Doctor *Park*: The honoraries of Phyſicians may be preſumed paid at the time of attendance, where the Phyſician and patient are ſtrangers to each other; but that preſumption does not take place, where the parties are nearly connected together; in that caſe, it is not probable the fees would be paid with the ſame regularity with which they are in uſe to be paid to a ſtranger.

" The Lords found, That the fees ſtated by the purſuer as a Phyſician " are preſumed to have been paid, except during the deathbed-ſick- " neſs of the defunct, which they modified." J. D.

For Doctor *Park*, *Brown*, *J. Dalrymple*. Alt. *W. Wallace*, *Miller*.

*N. B.* The interlocutor did not expreſs whether fees were preſumed not paid, during the whole of the laſt ſickneſs, or only during the laſt ſixty days of it; but the ſum modified was ſo ſmall, that the laſt ſeemed to be implied.

N° CXXXV. 12th *February* 1755.

Mr. *NEIL CAMPBELL*, and others, Creditors of Lord *Ruthven*, Petitioners.

THE lands of *Ruthven*, entailed under prohibitive, irritant, and reſolutive clauſes, were ſequeſtrated for the behoof of the creditors of Lord *Ruthven*.

The creditors repreſented, That the tacks on this eſtate had expired; that the entail did not prohibite the granting of tacks, and that the rents could not be raiſed, unleſs tacks were granted to endure for nineteen years: they therefore prayed, That the factor might be authorized to grant tacks of the endurance aforeſaid.

No objection was offered for the heirs of entail.

" The Lords granted the deſire of the petition; and ordained, That the " tacks ſhould be ſet at the ſight of the Sheriff-Subſtitute, or his De- " pute, and that the ſaid Sheriff, or his Depute, ſhould ſign witneſs " to the tacks ſo ſet." D

Petitioner *J. Craigie*.

N° CXXXVI.

N° CXXXVI. 12th *February* 1755.

Mrs. *JEAN MARIA FORBES*, and Mrs. *ELIZABETH FORBES*, Daughters of the deceas'd *William* Lord *Forbes*, and Captain *JAMES DUNDAS*, Huſband to the ſaid Mrs. *Jean Maria*, and Doctor *JOHN GREGORY*, Huſband to the ſaid Mrs. *Elizabeth*, for their reſpective Intereſts;

againſt

*JAMES* Lord *FORBES*.

BY marriage-articles, dated 3d *September* 1720, entered into betwixt *William* Lord *Forbes* and *Dorothy Dale*, father and mother to the purſuers; *William* Lord *Forbes* ſettled his eſtate in favour of himſelf, and the ſaid *Dorothy Dale*, and longeſt liver, in liferent, and of the heir-male of the marriage in fee; whom failing, in favour of his other heirs-male whatſoever, under prohibitive and irritant clauſes, againſt contracting of debt, or altering the order of ſucceſſion; and the articles contain the power and faculty following:

" That, in caſe there be an heir-male of the ſaid intended marriage, " and one or more younger children, that then, and in that caſe, it ſhall, " and may be lawful to and for the ſaid Lord *Forbes*, at any time in his " life, *ac etiam in articulo mortis*, to make ſuch proviſions for his ſaid " younger child, or children, as he ſhall think fit; and therewith to " affect and burden the foreſaid lands and eſtate, providing the ſame do " not exceed, in whole, the ſum of *L.* 3000 *Sterling*, to be divided and " proportioned amongſt the ſaid younger child, or children, as the ſaid " Lord *Forbes* ſhall direct and appoint: And, in caſe the ſaid Lord *Forbes* " ſhall die, without making any proviſions for ſuch younger child, or " children, as he ſhall then have, or ſhall not charge the eſtate with the " whole ſum of *L.* 3000, for that purpoſe; then, and in either of theſe " caſes, it ſhall, and may be lawful for the ſaid *Dorothy Dale*, if ſhe ſur- " vive the ſaid Lord *Forbes*, to charge the ſaid eſtate with the ſaid ſum of " *L.* 3000; or ſuch part, thereof, as ſhall not be charged by the ſaid " Lord *Forbes*, to be paid to ſuch younger child, or children, and in ſuch " proportions as ſhe ſhall think fit."

There was iſſue, of this marriage, one ſon, *Francis*, and three daughters, *Mary*, *Jean Maria*, and *Elizabeth*; and, in *June* 1730, Lord *Forbes*, when on deathbed, granted a bond of proviſion in favour of his daughters; whereby he obliged himſelf, his heirs and ſucceſſors, to pay certain ſums of money to them, amounting, in whole, to the ſum of *L.* 2000, at their reſpective marriages or majorities, with annualrent, from the firſt term of *Whitſunday* or *Martinmaſs* after his deceaſe. The bond provides, That, in caſe of the deceaſe of any of the daughters, their ſhare ſhall return to his ſon *Francis*; and, in caſe of his deceaſe, he ſubſtituted the daughters to each other.

*William* Lord *Forbes* died a few days after executing of this bond of proviſion; and, ſome years thereafter, his ſaid ſon *Francis*, and *Mary* his eldeſt daughter, alſo died; and *James Forbes*, brother to *William* Lord *Forbes*, ſucceeded to the honours and eſtate of *Forbes*.

*Jean Maria*, and *Elizabeth*, and their huſbands, brought a proceſs againſt *James* Lord *Forbes*, for payment of the principal ſum, due to

them by their father's bond of proviſion, and for the annualrents thereof, from *Martinmaſs* 1730, being the firſt term after his death.

The defender *pleaded*, by way of defence, againſt payment of the annualrents which had become due betwixt the term of *Martinmaſs* 1730, and their reſpective marriages: That the bond could not be effectual againſt him, the heir; becauſe granted by *William* Lord *Forbes*, when on deathbed: but he did not plead this defence againſt payment of the principal ſum and annualrents, ſince the reſpective marriages of the purſuers; becauſe the purſuer's mother, the Lady Dowager of *Forbes*, had diſcharged the defender of claims much greater than the ſaid principal ſum and annualrents, from her daughters marriages, which claims were to revive, if the defender made any objection againſt payment of the ſaid principal ſum and annualrents.

*Anſwered* for the purſuers: 1*ſt*, That the law of deathbed does not ſtrike againſt deeds done in implement of prior obligations; and there can be no obligation ſtronger on a man, than that of providing for his children; nor is this obligation merely moral, it is alſo legal; for it has frequently been found, by this Court, That the heir is obliged to aliment the daughters, or other children of the deceas'd, who are not in a capacity to ſupport themſelves; and theſe deciſions are founded on this principle, That there was a legal obligation upon the father to provide for, or aliment his children, after his death; which, upon his failure, becomes effectual againſt his repreſentative.

2*dly*, Whatever may be the caſe, in general, with reſpect to proviſions granted by a father on deathbed to his younger children, yet the law of deathbed cannot affect the proviſions purſued for; becauſe, 1*mo*, by the marriage-articles above mentioned, Lord *Forbes* reſerved a power to himſelf, at any time in his life, *et etiam in articulo mortis*, to burden his heir with any ſum in favour of his younger children, not exceeding *L.* 3000; and the granting the bond of proviſion purſued on, was an exerciſe of that power or faculty. The ſum of *L.* 3000 is to be conſidered as ſet apart for the younger children, at the time of the marriage: but, as it was improper to make them independent on their father, ſpecial proviſions were not made for them in the event of their being one, two, or more; but the proviſion was conceived the form of a power or faculty granted to the father, of giving them proviſions to the extent of *L.* 3000; which faculty might lawfully be exerciſed at any time.

2*do*, It has frequently been decided by this Court, That, when one ſettles his eſtate upon a ſtranger, under certain conditions and faculties to be exerciſed on deathbed, the ſtranger cannot plead the law of deathbed againſt the exerciſing of theſe faculties; becauſe ſuch was the condition of the grant, under which the ſtranger takes. And, in the preſent caſe, the defender may be conſidered as a ſtranger; for, when *William* Lord *Forbes* entered into the marriage-articles, he enjoyed the eſtate of *Forbes* without any limitations, and might have ſettled it on whomever he pleaſed, and might reaſonably have given it to his daughters, his heirs of line, preferably to the defender; but he ſettled the eſtate on the heirs-male, under the expreſs condition of his having a power to burden it to a certain extent, *etiam in articulo mortis:* under this condition it comes to the defender; and therefore he muſt either take it under the condition, or repudiate it altogether.

3*tio*,

3*tio*, Even where one diſpones his eſtate to him who is *alioque ſucceſſurus*, under certain reſerved powers and faculties, to be exerciſed by the diſponer at any time, *etiam in articulo mortis*, the heir will be ſubjected to the burdens impoſed by the diſponer on deathbed, in virtue of the reſerved powers, if it appear, as it plainly does in the preſent caſe, that the diſpoſition was not made, and the powers reſerved in order to elude the law of deathbed; and this muſt undoubtedly obtain, if the heir accepts of the diſpoſition, and poſſeſs by virtue of it, as has frequently been decided; particularly, 28th *June* 1662, *Hay* againſt *Seton*; 22d *June* 1670, *Douglas* againſt *Douglas*; 8th *February* 1706, *Bertram* againſt *Weir*. And, altho' the defender has made up his titles to the eſtate, by a ſervice as heir-male, and not by the procuratory contained in the contract of marriage, yet he muſt be preſumed to have taken it, by virtue of the ſettlement contained in the ſaid marriage-contract; for, as *William* Lord *Forbes* had full power to make the tailzie with the prohibitory and irritant clauſes, contained in the ſaid marriage-contract, the defender was not at liberty to repudiate that ſettlement, and to take the eſtate upon the former inveſtitures in favour of the heir-male; as was decided in the caſe of *Turnbull* againſt *Kinnier*; 22d *February* 1712; and in the caſe of Lord *Strathnaver* againſt the Duke of *Douglas*, 2d *February* 1728.

*Replied* for the defender: That, altho' it be the duty of every man to provide for his children, yet he ought to do ſo, *debito tempore*, and not when he is *moribundus*; for the law of deathbed ſtrikes againſt every deed done by a perſon when on deathbed, to the prejudice of his heir, without diſtinguiſhing whether the deed be gratuitous, rational, or onerous. *Craig*, *lib.* 1. *dieg.* 12. § 36. *Sunt etiam qui ratione temporis in feudum concedere non poſſunt; veluti, ſi quis in lecto ægritudinis ſit conſtitutus; quo tempore neque alienare res hæreditarias, neque immobiles, neque obligare ſe, aut contrahendo, aut debitum agnoſcendo poteſt, unde hæreditas, aut ejus pars ſucceſſori decedat.* After a perſon comes to be on deathbed, *civiliter pro mortuo habetur*, as *Dirleton* obſerves, *p.* 186. ſo far as concerns his power of burdening his heritage; and therefore he cannot burden it with proviſions to his younger children; and it has uniformly been ſo decided by this Court, as often as the queſtion has occurred; particularly, 1ſt *July* 1637, Lord *Cranſton Riddell* againſt *Richardſon*; *July* 1721, *Fowlis* of *Collington* againſt *Fowlis*; and in 1737, Creditors of Sir *Patrick Strachan* againſt *Elizabeth Strachan*. Were it otherwiſe, no heir could be ſafe, where his predeceſſor had younger children, or daughters, about him, at the time of his ſickneſs, who could eaſily elicite from him, when *moribundus*, ſuch proviſions as they thought proper; and, to deliver dying perſons from ſuch ſolicitations, was one great deſign of the law of deathbed.

And as in general one cannot on deathbed burden his heir with proviſions to his younger children, ſo the bond purſued on cannot be ſupported by the power or faculty reſerved to the purſuer's father in his contract of marriage; for that the defender cannot be conſidered as a ſtranger who could only take under the diſpoſition, and therefore could not object to the conditions of the deed: for the inveſtitures ſtood in favour of heirs-male; and the defender was the heir of the inveſtiture. And it is certain, That one cannot, by any deed in favour of his heir, create a power to himſelf to alienate or burden his heritage on deathbed; for it is a rule in law and reaſon, *Nemo poteſt cavere ne leges in teſtamento ſuo locum habeant:* and the Court has uniformly decided agreeably to this rule; particularly

25th

25th *February* 1663, *Hepburn* of *Humbie* againſt *Helen Hepburn*; *January* 1734, *George Ballantyne* againſt *William Ballantyne*. In the caſes mentioned for the purſuers, the heirs had homologated the ſettlements made by their predeceſſors reſerving the power to diſpone and burden on deathbed: but in the preſent caſe the defender never homologated the ſettlement made by the purſuer's father, having made up his titles by ſervice as heir of the inveſtitures, and not upon the procuratory contained in the contract of marriage. And altho', notwithſtanding thereof, he may be bound by the prohibitive and irritant clauſes which the late Lord *Forbes* had power to impoſe, yet he cannot be bound by any of the conditions which are reprobated by law.

" The Lords ſuſtained the defence of deathbed relevant to aſſoilzie the
" defender from the claim of annual rents made by the purſuers up-
" on their bond of proviſion previous to their reſpective majorities or
" marriages. *Reversed.* B

Act. *Advocatus And. Pringle, Ja. Dundas & Bruce.* Alt. *Ferguſon, Lockhart, Burnet & Grant.* Clerk, *Kirkpatrick.*

## N° CXXXVII. 15th *February* 1755.

The MAGISTRATES of *GLASGOW*
againſt
*WILLIAM MACFAIT*, and others.

*MACFAIT* and others took a leaſe of the malt-mills of *Glaſgow*, and granted bond for the rent.

Being charged, by the Magiſtrates, for payment of this bond, they obtained ſuſpenſion, and *pleaded:* That the Provoſt of *Glaſgow* promiſed, at the time of the bargain, That the brewers, who imported ale, brewed by them without the regality of *Glaſgow*, ſhould pay multures to the malt-mills: That this promiſe which induced the ſuſpenders to give the rent demanded, has not been performed; and that a proportional deduction ought therefore to be made from the rent. Of this promiſe they demanded a proof by witneſſes.

*Anſwered* for the Magiſtrates of *Glaſgow:* No ſuch promiſe was made, nor could in reaſon have been made; neither is a proof by witneſſes competent. The terms of a leaſe in writing may not be altered, nor a bond, apparently abſolute, rendered conditional by the evidence of witneſſes. Parties who contract in writing, are underſtood to reject all proof of the obligation other than what ariſes from the deed itſelf, or from writings relative to it. Solemn obligations in writing muſt not be invalidated by witneſſes, who may forget the preciſe words uttered at the time of the bargain, or not underſtand their import, or wilfully miſrepreſent them.

" The Lords refuſed to grant a proof by witneſſes, and found the let-
" ters orderly proceeded." D

Act. *Miller.* Alt. *Lockhart.* Reporter, *Juſtice Clerk.* Clerk, *Gibſon.*

## N° CXXXVIII.

N° CXXXVIII. 18th *February* 1755.

*NINIAN JAFFRAY* and others
againſt
The DUKE of *ROXBURGH.*

IN the 1614, the Crown granted a charter of the barony of *Halydean*, comprehending the town of *Kelſo*, to *Robert* Lord *Roxburgh* in liferent, and to *William Ker* his ſon in fee.

This charter erects the town of *Kelſo* into a burgh of barony; and contains the following clauſe: *Cum plenâ poteſtate* Willelmo Ker *forum publicum hebdomadatim tenendi, et annuatim duas liberas nundinas, infra dictum burgum celebrandi, cuſtumas et divorias earundem recipiendi et levandi, ac eaſdem ad commune bonum dicti burgi applicandi.*

In the 1634, the Crown granted a new charter to the ſame *Robert* Lord *Roxburgh*, wherein the clauſe aforeſaid is repeated; but, in a charter granted to him in the 1647, the cuſtoms are ſimply and abſolutely granted, and all the ſubſequent rights of the family of *Roxburgh* have been taken in terms of the charter 1647.

*Jaffray* and others, feuars and inhabitants of *Kelſo*, raiſed a proceſs of declarator againſt the Duke of *Roxburgh*; concluding, That his Grace ſhould, in terms of the charters 1614 and 1634, granted to his predeceſſors, apply the cuſtoms aforeſaid for the common good of the burgh.

*Objected* for the Duke of *Roxburgh*: 1*mo*, The purſuers could, at moſt, have had only a perſonal right of action on the charters 1614 and 1634: now, theſe charters have never, ſince the 1647, been a title of poſſeſſion; and, of conſequence, no action can lie on them. Further, the family of *Roxburgh* has, by the poſitive preſcription, acquired an abſolute right to the cuſtoms under the charter 1647, and the ſubſequent charters and infeftments. 2*do*, The terms of the charters 1614, and 1634, ſuppoſing them to be ſtill in force, import not an obligation to apply, but only a faculty of applying; and ſo have they been explained by immemorial poſſeſſion; for that the family of *Roxburgh* has been in the conſtant uſe of levying theſe cuſtoms, without rendering any account to the burgh of *Kelſo*.

*Anſwered* for the purſuers: 1*mo*, The cuſtoms were, by the original grants, appropriated to the town of *Kelſo*; Lord *Roxburgh* and his repreſentatives were named, by the Crown, truſtees for theſe uſes; the right of levying the cuſtoms was granted to them in that capacity, and every ſubſequent right muſt be deemed granted under the ſame condition; as the cuſtoms have been levied by the family of *Roxburgh*, in truſt, for the town of *Kelſo*, poſſeſſion by the family of *Roxburgh* muſt be held to be poſſeſſion by the town of *Kelſo*; and therefore no preſcription can be here pleaded. 2*do*, Power granted by charter to do a thing for the uſe of a third party, or for the benefit of the public, imports an obligation to do it; and, as the Duke of *Roxburgh* has levied the cuſtoms, he muſt alſo apply them in terms of the grants.

" The Lords repelled the whole defences offered for the Duke."

The purſuers alſo ſet forth, That the burgeſſes and inhabitants of *Kelſo* have been immemorially accuſtomed to waſh and dry their linen on an iſland ſituated in the *Tweed*; and they concluded, That their right of conti-

nuing in poſſeſſion of this iſland, for the purpoſes aforeſaid, ſhould be declared.

The defender *objected:* That he is proprietor of the ground on both ſides of the river, and muſt therefore be held, in law, proprietor of the iſland alſo, unleſs the purſuers bring evidence that they have acquired right to it, either by grant or preſcription. No ſervitude can, in this caſe, be pleaded; for that there are no lands granted to the incorporations, to which, as a *prædium dominans*, the ſervitude could belong.

*Anſwered* for the purſuers: The charter, erecting *Kelſo* into a burgh of barony, bears, *cum omnibus et ſingulis terris, et ſingulis ſuis pertinentiis*; as the burgeſſes and inhabitants of *Kelſo* have immemorially poſſeſſed the iſland, the preſumption in law is, That it was included in the charter.

" The Lords found it proven, That the burgeſſes, inhabitants of the " burgh of *Kelſo* have been immemorially in the conſtant uninter- " rupted poſſeſſion of whitening and drying their linen upon the " iſland; and therefore find them intitled to continue their ſaid poſ- " ſeſſion of whitening and drying their linen there as formerly. D

Act. *Ferguſon, A. Pringle.* Alt. *Binning, Lockhart.* *Reversed.* Clerk, *Murray.*

N° CXXXIX. 18th *February* 1755.

## CREDITORS upon the Eſtate of *Woodſtone.*

againſt

## Colonel *SCOT* of *Comiſtone.*

FOR ſeveral years preceeding the 1742, a variety of hornings and captions were taken out againſt *Alexander Turnbull of Woodſtone.*

On the 31ſt of *March* 1742, upon a caption, at the inſtance of one of his creditors, he was apprehended by a meſſenger, who detained him priſoner for that night and part of next day, but without putting him into a jail, and then liberated him, upon payment of part of the debt.

At this time, *Alexander*'s debts equalled his ſubject, ſo that he was legally inſolvent.

On the 17th *June* 1742, when a caption was again out againſt him, *Alexander Turnbull* granted an heritable bond upon the lands of *Woodſtone* for 10,000 merks, to General *Scot*, for ſecurity of former claims the General had on him.

In a ranking of the creditors, upon the judicial ſale of the eſtate of *Woodſtone*, Colonel *Scot*, the ſon of the General, claimed a preference, upon this heritable bond, to the perſonal creditors of *Alexander Turnbull.*

The perſonal creditors *objected*, to the ſecurity in the bond: That it was null, on the act 1696, *cap.* 5. in reſpect that it was granted by *Alexander Turnbull* when inſolvent and a notour bankrupt, in terms of the ſtatute, which was qualified from this circumſtance of his having been in the hands of the meſſenger, as above narrated.

The queſtion came to be, Whether inſolvency, joined to cuſtody, for ſome time, in a meſſenger's hands, tho' not in actual jail, made a debtor a notour bankrupt, in terms of the act 1696.

*Pleaded*

*Pleaded* for the Creditors: At common law, it is wrong in a bankrupt to prefer one creditor to another; to aſſiſt the common law, and to prevent the frauds of bankrupt debtors, the ſtatute 1696 was made.

A ſtatute made for preventing fraud is not to be taken literally, but ought to be extended, in order to prevent frauds, to all caſes which fall under the purview and reaſon of the act.

The ſtatute in queſtion enumerates the moſt common deſcriptions of bankrupts, as impriſonment, retiring, flying, *&c.* joined with inſolvency; but theſe exclude not others, they are enumerated only as examples; but all ſituations of the debtor, which ſhow him to be bankrupt, make him fall under the act.

The ſtrict word *impriſonment* has its equivalents in the law of *England*; if one eſcapes from the houſe of the conſtable, or even from his arreſt, he is guilty of breach of priſon.

Impriſonment has its equivalents even in the law of *Scotland*; if a debtor is in cuſtody of a meſſenger, a ſiſt on a bill of ſuſpenſion will not protect him from impriſonment; for his impriſonment after cuſtody is deemed to be no more than a continuation of the ſame ſituation; and that conſequently he is uncapable of receiving the benefit of a ſiſt.

That actual impriſonment was not required by the ſtatute, will appear from the conſequences of a contrary conſtruction: if a meſſenger attempts to ſeize a debtor, and he makes his eſcape, the debtor is confeſſedly bankrupt; if he ſeizes him, but afterwards lets him eſcape, the debtor, according to this conſtruction, would not be bankrupt; here then the attempt to ſeize would have a ſtronger effect than the actual ſeizure itſelf: a jail may be at ſo great a diſtance, that the debtor, for ſome time, cannot be put into it, or he might be in ſo bad health, that he could not be put in priſon, or he might die before he was impriſoned; if, in terms of the act, he was not under impriſonment, then all the preferences, granted by him during the time of his cuſtody, would be good.

*Anſwered* for Colonel *Scot:* The view of the ſtatute 1696, was to bar men in the uſe of their own property; and therefore it was very preciſe in deſcribing and aſcertaining the particular perſons whom it barred, to wit, thoſe who being inſolvent were impriſoned, or retired to the *Abbey*, or fled, or abſconded, or had forcibly defended themſelves; the notoriety of theſe acts, by which the lieges were put upon their guard againſt contracting any more with the debtor, made the law fix upon them as criterions of the bankruptcy of the debtor.

The remedy of the ſtatute is violent; it founds a reduction, not only in favour of all creditors doing diligence, but in favour of all having prior debts; it reduces not only deeds granted to anterior creditors for ſecurity of their debts, but even all deeds granted to them in ſatisfaction or payment; and not only conveyances of heritable ſubjects, but alſo aſſignations or other deeds, and this not confined to preferences taken at the time of the bankruptcy, but extended to all thoſe taken during ſixty days before it.

A ſtatute barring the common uſe of property, and voiding rights validly eſtabliſhed according to common law, cannot be extended. It admits of no equivalents: it can be directed againſt none but thoſe named in it.

The *Engliſh* law which puniſhes eſcape from an officer with the penalties of breaking priſon, puniſhes only the guilty contemners of the law.

But

But the ſtatute 1696 would by this conſtruction puniſh innocent creditors: the extenſion then, which in the one caſe is proper, in the other is not.

The law of *Scotland* admits no equivalent upon this ſtatute: impriſonment upon an act of warding has not been deemed impriſonment within the act, becauſe it had not proceeded upon diligences by horning and caption.

The conſequences urged of the difficulty of finding a priſon, or of the ſickneſs or death of a priſoner, are ſo ſpecial that a general law may have overlooked them. It is no objection to a law, that it cannot provide for every unlooked for contingency.

" The Lords repelled the objections made to the heritable bond, and " preferred Colonel *Scot* to the perſonal creditors of *Woodſtone*." J. D.

*Reversed.*

Act. *R. Dundas, Lockhart*, &c. Alt. *Ferguſon, Elliot*, &c. Clerk, *Gibſon*.

CXL. 18th *February* 1755.

*HENRY GILLIES* Merchant in *Linlithgow*, and others,

againſt

*ALLAN WAUGH* Merchant in *Linlithgow*, and others.

AT the annual election of Magiſtrates and Counſellors for the burgh of *Linlithgow* made at *Michaelmaſs* 1754, there was a controverted election, and a double ſet of Magiſtrates and Counſellors choſen, and each party brought a proceſs before the Court of Seſſion, for declaring their own election, and reducing the election made by the oppoſite party.

It was *objected* by *Allan Waugh* and his party, againſt the action brought by *Henry Gillies* and his party, That there was no proceſs, all perſons having intereſt not being made parties to the ſuit; for *John Buckney*, who had been Provoſt of the burgh for the year preceeding, and behoved by the ſet of the burgh to continue a Counſellor for the current year, and *Andrew Buckney* who was a Counſellor for the preceeding year, and had by the purſuers been re-elected a Counſellor at *Michaelmaſs* laſt, were neither purſuers, nor called as defenders.

*Anſwered* for the purſuers: That it was not neceſſary to make *John* and *Andrew Buckney* parties to the action, becauſe they had not as yet accepted of the offices of Counſellors; and altho' it be cuſtomary in all the burghs, that the perſons who have born offices in the magiſtracy for the preceeding year, ſhould remain in the council for the ſucceeding one, yet the office-bearers are not bound to continue in council if they chuſe to be free of the burden; and, as an evidence of this, they, as well as the other Counſellors, after the election, declare their acceptance, and take the oaths to the Government. And ſince it was optional to *John* and *Andrew Buckneys* to accept or refuſe the office, they could not be conſidered as poſſeſſed of it, until they declared their acceptance.

2*dly*, The purſuers *contended*, That *John* and *Andrew Buckneys* were now barred from accepting of the office by the act 6*to Annæ*, *cap.* 14. which enacts, That every perſon admitted into a civil office, ſhall within three months after his admiſſion take the oaths to the Government, and, in caſe of neglect, he is declared incapable to enjoy the office.

3*dly*,

3*dly*, That ſuppoſing they were to be conſidered as Counſellors, yet there was no occaſion for calling them as defenders, becauſe the ſummons contained no concluſion againſt them.

4*thly*, That if it was neceſſary to make them parties to the proceſs, they might yet be made parties to it, by being called as defenders by an incident diligence.

*Replied* for the defenders: That this action muſt be caſt, as *John* and *Andrew Buckneys* were not made parties to it, even altho' they had not been members of the council for the current year; becauſe they were members of the laſt year's council, and therefore behoved to be parties in any proceſs for declaring or reducing an election made by that council.

2*dly*, That *John* and *Andrew Buckneys* were not at liberty to accept or refuſe to be Counſellors; for that all burgeſſes are bound to accept of the offices into which they are elected by the Town-Council, if the Council inſiſt upon their accepting of them. But whatever be in this, it was certain *John Buckney* ought to be conſidered as a Counſellor: for he was not elected into that office at *Michaelmaſs* laſt, but continued in it by virtue of his having been Provoſt for the year preceeding; by accepting of which office he ſubjected himſelf to all the burdens conſequent thereupon. And even ſuppoſing that an acceptance had been neceſſary in order to veſt him in the office, yet, as he had it in his power to accept when the ſummons was executed, he ought to have been made a party to the proceſs; in the ſame way as a creditor of a defunct, in a proceſs againſt heirs portioners, muſt call all of them, tho' ſome of them have not acknowledged the ſucceſſion at the time the ſummons is raiſed.

To the *ſecond* anſwer *replied:* That perſons are by the act 6*to Annæ* only obliged to qualify within three months after they begin to act in conſequence of the office; and that, at any rate, *John* and *Andrew Buckneys* had not forfeited the offices in *November* when the ſummons was raiſed.

To the *third* anſwer *replied:* 1*mo*, That the ſummons contains a concluſion that *John* and *Andrew Buckneys* ought to be found and declared members of the Council. 2*do*, That altho' it had contained no concluſion with reſpect to them, yet they behoved to be called, becauſe otherwiſe the repreſentation of the burgh was not full; and for this reaſon, when a proceſs is only for reducing or declaring the election of a ſingle Counſellor, the whole members of the Council muſt be made parties, either as purſuers or defenders, as the Lords found 28th *January* 1741. *George Heriot* and others againſt *Charles Cockburn* Provoſt and others Counſellors of the burgh of *Haddington*, where the Lords ſuſtained the objection of no proceſs, becauſe one of the Council-deacons was not called, tho' it was pleaded, That he needed not be made a party, becauſe the purſuers were not diſputing his right to ſit in Council.

To the *fourth* anſwer *replied:* That a principal party cannot be brought into proceſs by an incident diligence, but muſt be called by a principal ſummons, and have the ordinary *induciæ* given him; as has been often decided, particularly 18th *February* 1747. Lord *Forbes* againſt the *Earl* of *Kintore* and others, obſerved by *Falconer*, *vol.* i. N° 168. and lately in the caſe of a ſale purſued by *Dalgleiſh* againſt *Hamilton*, where the Lords found, That *Hamilton*'s curators could not be called by an incident diligence.

" The Lords ſuſtained the objection, and found no proceſs." B

Act. *And. Pringle, Miller, & Johnſton.* Alt. *Ferguſon, Brown, & Bruce.* Clerk, *Home.*

N° CXLI. 18th *February*, 1755.

*THOMAS FORRESTER* of *Denovan*
againſt
Sir *GEORGE PRESTON* of *Valleyfield.*

SIR *George Preſton* was inrolled in the roll of the freeholders of the county of *Stirling* intitled to chuſe a repreſentative to Parliament, at their meeting held for election 17th *May* 1754.

*Thomas Forreſter*, one of the freeholders, complained of the inrollment to the Court of Seſſion, and *objected*, That the defender's lands were not of *L.* 400 valuation, and that the Commiſſioners of Supply who had lately disjoined their valuation from the original valuation *in cumulo* of the barony of *Airth*, whereof they were a part, had made a wrong diviſion, on purpoſe to create a vote to the defender. For, 1*ſt*, The committee of Commiſſioners, in taking a proof of the rent of theſe parts of the barony which belong to Mr. *Graham*, and had been feued out by him and his authors, had only taken a proof of the feu-duties payable to Mr. *Graham*; whereas, when any of the defender's lands had been feued out, they had taken a proof of the real rent of theſe lands, as appeared from the minutes of the Commiſſioners of Supply, where this unfair proceeding of the committee was objected againſt. 2*dly*, The committee had omitted altogether to take a proof of the rent of ſome parts of the barony which belonged to Mr. *Graham*, amounting to *L.* 412 *Scots* yearly, which had been objected againſt the report of the committee when made to the general meeting of the Commiſſioners of Supply, and the purſuer had offered to inſtruct the objection to the meeting of freeholders by the affidavits of the tenants in theſe parts of the barony, and now offered to prove theſe facts by them and by other witneſſes.

*Anſwered* for the defender: 1*mo*, That the feu-duties were the real rents of the lands at the time they were feued out, and that the increaſe of the real rent was owing to the feuers building houſes on their feus; and therefore that the feu-duties ought to be conſidered as the rent, conform to which the valuation of the lands ſhould be divided. 2*do*, That the feus belonging to Mr. *Graham* were numerous and ſmall, ſo that a proof of the real rent of them would have been very difficult, if not impoſſible, eſpecially as many of them are in the natural poſſeſſion of the feuers: and altho' it was an error not to follow the ſame rule in the proof of the rent of the defender's part of the barony, yet the error did not affect the defender's qualification for voting; becauſe, tho' the difference betwixt the real rent and the feu-duties, which is only *L.* 59: 13: 4 *Scots*, were deduced, ſtill the valuation of his lands would exceed the *L.* 400 *Scots.*

And, as to the alledgeance that the Commiſſioners had altogether omitted to take a proof of the rent of ſome parts of the barony belonging to Mr. *Graham*: *Anſwered*, That the affidavits were no legal proof of the fact; and that the meeting of the freeholders could not take a proof of it; but behoved to conſider the decree of the Commiſſioners of Supply, as proper evidence of the valuation, unleſs an error had appeared *ex facie* of the decree; and as, in this complaint, the Lords are only reviewing the proceedings of the freeholders; therefore, if they did right, the Lords muſt affirm

affirm their judgment, altho' the decree of the Commiſſioners ſhould be liable to be reduced, when a proper proceſs is brought for that purpoſe.

*Replied* for the purſuer: That the real rent of the feus holding of Mr. *Graham*, in one part of this eſtate alone, exceeds the feu-duties payable to him out of that part, by *L.* 700 *Scots* of yearly rent; and the whole of this difference is not owing to the rents payable for houſes, but is partly rents of lands; of which a proof by witneſſes was offered: and it was *contended*, That a proof of this, and of the other alledgeance, *viz.* that part of Mr. *Graham*'s real rent had been omitted to be proved, was competent, both before the freeholders, and in this proceſs; becauſe, altho' the freeholders cannot reduce the decrees of the Commiſſioners of Supply, yet they are Judges, in the firſt inſtance, of the Commiſſioners decrees of diviſion, ſo far as concerns the right of voting for members of Parliament; and not only may, but ought to diſregard theſe decrees, when they appear to be partial and iniquitous, and that whether the iniquity appears *ex facie* of the decree, or the objections were offered to be proved by unexceptionable evidence: That, in the preſent caſe, it appeared, from the decree of the Commiſſioners, and from the minutes of election by the freeholders, That theſe objections, which were undoubtedly relevant, had been made, and a proof of them offered to the Commiſſioners, and to the freeholders, and that they had both refuſed to admit the proof. This was the wrong complained of; and, for that reaſon, ſubject to the review of the Lords in this complaint; were it otherwiſe, the right of electing members of Parliament would be put, not into the hands of the freeholders, but intirely in the power of the Commiſſioners of Supply; ſince, if this method of obtaining redreſs was prevented, it may be juſtly called in queſtion, Whether any particular freeholder could purſue a reduction of the decree of the Commiſſioners of Supply; ſeeing he could have no pecuniary intereſt in the matter?

"The Lords diſmiſſed the complaint."

B

Act. *J. Dundas*, & *Cockburn*. Alt. *Lockhart*, & *A. Pringle*. Clerk, *Forbes*.

N° CXLII. 19th *February* 1755.

## *DUFF*

against

## *CHAPMAN.*

IN a proceſs of ranking of the creditors of *Alterlies*, *William Duff* being preferred *primo loco*, for the principal and intereſt contained in an heritable bond and infeftment; he alſo claimed preference for the penalty, to the extent of the expences of infeftment, of the coſts of ſuit in this competition, and, further, of the coſts of ſuit in a former competition for the ſame debt, upon another eſtate, which belonged to a co-obligant in the bond, but wherein he had been caſt.

*Chapman* admitted that *Duff* ſhould be preferred for the expences of the infeftment, and of diligence, if any, againſt the debtor; but *objected* to the coſts of ſuit in both competitions: 1*mo*, For that the terms of this bond were, "for ſecurity of the principal ſum, annualrents thereof, that "ſhall

" ſhall happen to fall due, and penalty, if incurred, and the other ſums, " charges, and expences, contained in the reverſion, if they be deburſed " and expended in the debtor's default." Now, the expences in neither of the competitions were incurred thro' the debtor's default. And, 2*do*, The expences of the firſt competition were incurred in a different ranking with other creditors, upon an eſtate belonging to another perſon, and were incurred by reaſon of the purſuer's litigiouſneſs; for he was poſtponed. 3*tio*, Granting he had a claim againſt the debtor for the penalty, to the extent of theſe coſts, yet he ought to have no preference in competition with other creditors, becauſe it was an abſurdity, that lands ſhould be affected by an infeftment for a debt, taken before the debt exiſted.

*Anſwered* to the *firſt* and *ſecond:* That all the coſts, juſtly expended in the recovery of the debt, and, by conſequence, the expence of competition, are incurred thro' the debtor's default.

To the *third:* That infeftment is given for the penalty, which is held to be an exiſting debt, tho' the Lords, from their *nobile officium*, generally reſtricted it to the expences really deburſed.

" The Lords found, That *William Duff* was intitled to be preferred " for his penalty, to the extent of the expences in recovering his " debt." s

Act. *Hamilton, Gordon.* Alt. *Burnet.* Clerk, *Kirkpatrick.*

N° CXLIII. 28th *February* 1755.

*JAMES MACPHERSON*

againſt

*JAMES GRANT*, Deputy-Factor on the Eſtate of *Lovat.*

THE defender's wife purchaſed a horſe from one *Clerk*, tenant in *Urquhart*; but, as ſhe did not know him, ſhe demanded burgh and hamehald; and *Macdonald*, alſo a tenant in *Urquhart*, became his burgh or cautioner.

Sometime after, the purſuer having claimed the horſe, as his property, ſtoln from him; the defender ſent for *Clerk* and *Macdonald*; they denied that the horſe was ſtoln, and they accompanied the purſuer to the Bailie of *Urquhart*, who ordered reſtitution of the horſe to the purſuer; ſoon afterwards, the purſuer brought action againſt the defender for the damages incurred in recovering the horſe.

*Pleaded* for the defender: That his character and his wife's put them above any ſuſpicion of being acceſſory to theft; in this caſe, no circumſtances are againſt them; as ſoon as the horſe was claimed, he delivered up the thief to the purſuer; and therefore, as nothing could be laid to his door, nothing could be demanded of him more than the reſtitution of the horſe, which he had made accordingly.

*Replied* for the purſuer: That he had a like right to his damages as to his horſe: That the perſon, in whoſe cuſtody the horſe was found, was liable to him, *primo loco.* The taking of burgh and hamehald ſhowed that the defender ſuſpected the horſe was ſtoln: it was optional for him to have bought the horſe or not; and it was not unreaſonable he ſhould be put

put to ſeek relief from the perſon on whoſe faith or caution he had relied. This was further ſupported by reaſons of public utility, for diſcouraging the receipt of theft.

The Court was of opinion, That the taking of burgh and hamehald was no preſumption againſt the defender, that he was acceſſory to the theft, or was a reſetter of theft.

" The Lords aſſoilzied the defender." S

*Act. Ch. Hamilton, Gordon.* Alt. *Alex. Boſwall.* Clerk, *Forbes.*

N° CXLIV. 28th *February* 1755.

*BETHIA YULE*

againſt

*JOSEPH YULE.*

*JOHN YULE* being eighty years of age, and a batchelor, lent out two ſums upon bonds, taking the ſecurities to himſelf; and, failing himſelf, to his brother *Joſeph Yule*, his heirs, executors, or aſſignies.

Thereafter *John* married, and had a daughter *Bethia*.

*John* named her his univerſal legatrix, in all ſums, bonds, *&c.* in general, but without ſpecifying the above two bonds; in the ſame deed, he named tutors to her, of whom his brother *Joſeph* was one.

Upon *John*'s death, the tutors claimed the ſums in the bonds, for behoof of their pupil, on this ground, That the ſecurities taken by *John*, with a ſubſtitution to *Joſeph*, at a time when *John* had no children, and no likelihood of any, were evacuated, by the ſuperveening accident of his having a child: on the other hand, *Joſeph* claimed the two bonds, in terms of the ſubſtitution, and alledged, That the money which *John* had lent out was put into his hands by him, *Joſeph*, and was the proper money of *Joſeph*; and that the ſecurities taken were really intended to take effect, as expreſſed, altho' *John* ſhould have children.

The circumſtances which made this aſſertion probable or improbable, became, in a proceſs at the inſtance of the tutors againſt *Joſeph*, the ſubject of a proof; and, in leading it, a queſtion aroſe, Whether *Bethia* could have the benefit of the evidence of her own tutors.

*Objected* by *Joſeph:* One of the ſtrongeſt exceptions againſt a witneſs, is, his having given partial council in the cauſe, which muſt apply againſt the tutors here; ſeeing they are themſelves purſuers of the proceſs.

Agents, truſtees, and factors, are excluded from being witneſſes, much more ought tutors, who are, in a manner, *eædem perſonæ cum pupillo.*

Accordingly, the Lords decided, in the caſe *Waddels* againſt *Waterſtone*, 16th *July* 1707; and *Forbes* of *Gaſk* againſt Lady *Pitſligo*, 1ſt *July* 1628. *Vid.* others obſerved in the *Dictionary*, *vol.* ii. *p.* 521.

*Anſwered:* Tho' ſome Doctors in the civil law do exclude tutors in general, yet the texts of the civil law itſelf do not.

Agreeable to this, Lord *Stairs*, *tit. Probation*, *p.* 696. in enumerating at large, and with accuracy, thoſe, who, in our law, are excluded from being witneſſes; and, particularly, Advocates, Agents, Factors, and Truſtees, yet makes no mention of tutors in the cauſes of their pupils.

Theſe rules admit of two exceptions; a tutor cannot be a witneſs in a fact done by himſelf; a tutor cannot be a witneſs in a cauſe where he may have an intereſt from being liable afterwards to the *actio tutelæ*; concerning it the words of *Voet. ad. tit. pand. De teſt.* § 7. were cited for the one, *Juris quoque ratio refragari, haud videtur quo minus de rei geſtæ veritate jurato teſtentur, ſi modo de iis, quæ per alios geſta, non quæ ipſi tanquam tutores geſſerant.* The words of the ſame *Voet.* in the ſame ſect. were cited for the other; in which he adds, That the tutors oaths ſhall not be taken in caſes, *quorum intuitu actione tutelæ conveniri poſſunt, ne alias in re ſua, ſeu ea ex quam damnum ipſis imminet, videantur teſtes eſſe.*

In the caſe *Waddels* againſt *Wadderſtone*, the evidence of a tutor was excluded, becauſe it came under the firſt exception; in the caſe *Forbes* of *Gaſk* againſt Lady *Pitſligo*, it was excluded, becauſe it came under the ſecond.

But, where theſe exceptions take not place, it ſtands to reaſon, that pupils ſhould not be excluded from the evidence of thoſe who muſt be better acquainted with all tranſactions relating to their affairs, than any others who have themſelves no intereſt of their own at ſtake, and who are given, by the law, to minors for their benefit, not to exclude them from any benefit they might otherwiſe have.

"The Lords allowed the tutors to be examined." J. D.

*Act. Dalrymple.* *Alt. George Brown.*

N° CXLV. 1ſt *March* 1755.

*HELEN MILLER*

againſt

*GEORGE BEARD.*

THE purſuer alledged, That the defender was the father of a natural child, brought forth by her, and purſued him for the expences of the child-birth, and for the aliment of the child.

In proof of the fact, the purſuer produced the minutes of the kirk-ſeſſion; bearing, That the defender being interrogated if he was guilty with the ſaid *Helen Miller*, and father of her child; acknowledged he was: and the oaths of the Seſſion-Clerk, and another member of the ſeſſion depoſing to the verity of the ſaid minute.

The defender ſet forth, That all he had acknowledged before the kirk-ſeſſion was, "That he had had carnal knowledge of the purſuer only "five months preceeding her delivery." And he *pleaded*, That the minutes of the kirk-ſeſſion are not legal proof againſt him; they are not properly records, and are not ſuſtained to prove the time of the birth and baptiſm of a child inſerted in them; much leſs ought they to bear faith in a matter deemed criminal.

2*do*, Suppoſing the record of the kirk-ſeſſion to bear faith, the defender's acknowledgment therein mentioned cannot militate againſt him; becauſe not read to him, nor ſigned by him. In a caſe, decided 20th *November* 1679, *Mackie* againſt *Miln*, a decreet before an inferior Court, bearing the defender's confeſſion of his fault, not ſubſcribed by him, was found

found not probative. To the ſame effect are the caſes of the 13th *February* 1663, Town of *Linlithgow* againſt the unfreemen of *Borrowſtownneſs*; 19th *July* 1665, *Gun* againſt *Mackewen*; 20th *November* 1672, *Carrin* againſt *Wilſon*. This, therefore, being an eſtabliſhed point, there is no reaſon for giving greater faith to the minutes of a kirk-ſeſſion than to proper and legal courts of record.

With regard to the depoſitions of the two witneſſes concurring in ſupport of the verity of the minute, that the law is extremely cautious of allowing a proof by witneſſes of *nuda omiſſio verborum*; becauſe of the danger of words being miſtaken: for this reaſon, promiſes are only probable by oath of party; and the like has been found as to expreſſions in other caſes, *Dictionary*, *vol.* ii. *p.* 226. and 227.; this evidence, therefore, muſt be ſet aſide. In which caſe, *argued*, 2*do*, That, as his carnal knowledge of the purſuer was only five months preceeding the delivery, and the child come to maturity, he could not be the father; and it lay upon the purſuer to prove his dealings with her earlier than the time mentioned.

3*tio*, He alledged the purſuer was a common proſtitute, whoſe offſpring is, in law, called *vulgo quæſitus*, and is preſumed to have no particular father.

*Anſwered* to the *firſt* and *ſecond:* That, in a matter of this kind, the minutes of the ſeſſion, ſupported by the oaths of two of the members, added to his own limited acknowledgement, were convincing evidence.

To the *third:* That it was not relevant: he might purſue for relief againſt his partners.

" The Lords found the defender liable in expences of child-birth, and " for aliment to the child. S

Act. *Millar.* Alt. *Pringle.* Clerk, *Forbes.*

N° CXLVI. 4th *March* 1755.

Mr. *DAVID DALRYMPLE* Advocate, Captain *FORBES* of *New*, *ROBERT SIMPSON* of *Thornton*,

againſt

Sir *JAMES REID* of *Bara*.

BY charter, in the 1574, *James* VI. granted to the College of *Aberdeen* certain lands and ſuperiorities, particularly, the Chaplainries of *Weſthall*, and *Falayrule*, &c. declaring, *Quod omnia dicta beneficia in totum remanebunt, tanquam unita et annexata incorporata et mortificata, ut proprius reditus dicto noſtro collegio pro perpetuo in futurum:* TENENDA *pro perpetuo mortificat, in futurum,* CUM POTESTATE *ipſis per ſeipſos, dictis beneficiis terris annuis reditibus, eorundem utendi, occupandi, intromittendi, et deſuper diſponendi; et dicta beneficia et capillanias in feudi-firmam, ſeu aſſedationem locandi, &c.* REDDENDO *nobis, &c. ſervitium communium ſupplicationum et orationum, &c.*

The purſuers having purchaſed theſe ſubjects from the College, claimed thereon to be inrolled in the roll of freeholders in the county of *Aberdeen*; but their claim was rejected. They complained to the Court of Seſſion; and the defenders maintained the following objections, *viz.* 1*mo*, That

That the ſubjects in queſtion appeared, from the complainer's charters, to be mortified lands; and that, by the common law, mortifications are unalienable: the College of *Aberdeen* had only a power of adminiſtration, not of alienation. *Craig, lib.* 1. *d.* 15. § 7. ſays, *Inter prædia eccleſiaſtica numerantur, et collegia religioſa, et rite inſtituta, quorum res, ſine conſenſu regis, alienari, et in feudum dari, non poſſunt.* In this caſe, the words of the charter are explicit; and the grant of ſpecial powers of intromitting with rents, granting feus, *&c.* would have been ſuperfluous, had an unlimited property been intended.

2*do*, The lands hold neither blench, ward, nor feu; and therefore, tho' they were *in commercio*, they could not give the right of voting for a member of Parliament.

Of old, only temporal lands belonging to barons, appear, by our law, to have given a right to ſit in Parliament: church-lands, lands mortified for pious uſes, burgage-lands, gave no ſuch privilege. After the freeholders were allowed to ſend Commiſſioners to repreſent them in Parliament, the act 1587, *James* VI. *p.* 11. *cap.* 114. appointed theſe Commiſſioners ſhould be choſen by none but ſuch as had a forty ſhilling-land, in free tenandry, holding of the King. This would appear to exclude church-lands, and much more lands mortified to pious uſes. The act 1681, which introduces valuation in place of extent, makes no variation in reſpect of tenure; on the contrary, it limits the right of election to thoſe infeft *in kirk-lands now holden of the Crown, or other lands holding feu, ward, or blench*, of his Majeſty. Further, till 1712, mortified lands were always excepted from the Supply-acts; and, by conſequence, were not liable in public burdens: hence it is evident, That, to make mortified lands a title of enrollment, were, in every ſenſe, contrary, as well to the words, as to the true intent and meaning of the act 1681.

*Anſwered* for Mr. *David Dalrymple* and the other complainers, to the *firſt* objection: That, tho' the lands in queſtion were mortified lands, yet they were the property of the College; and, as there is no law or ſtatute to the contrary, the College muſt have that power of alienation which is inherent in property. In the *next* place, Suppoſing dilapidation could be charged againſt the Principal and Maſters of the College, which was not pretended to be the caſe here, yet that was *jus tertii* to the defenders: and an action of reduction upon that head could only be competent to ſucceeding Principals and Maſters. Had the complainers title been lands purchaſed from an heir of tailzie, or from a minor, theſe circumſtances might afford reaſons of reduction to the proper parties, but could never be the foundation of any objection to the qualification for having a vote.

——to the *ſecond* objection on the act 1681: That, according to the proper conſtruction of the words of the clauſe, *Whether kirk-lands now holden of the King, or other lands holding feu, ward, or blench of his Majeſty*, the words *ward, feu, or blench*, do not apply to *kirk-lands*, they only apply to *other lands holding of his Majeſty*; and therefore they could not be intended to apply to lands mortified to pious uſes; becauſe mortified lands are in the ſame claſs with kirk-lands, whereof the uſual *reddendo* was prayers and tears.

But, Suppoſing there was doubt upon the conſtruction of the act 1681, how far lands, held by mortification-tenure, could intitle to vote, yet that doubt is intirely removed by the act 16th *Geo.* II. *cap.* which, without diſtinction of the nature of the tenure, provides, That lands holden

holden of the King or Prince, liable in public burdens for *L*400, ſhall, in all caſes, be a ſufficient qualification.

" The Lords found, That the complainers, in virtue of their titles pro-
" duced, are ſufficiently intitled to be enrolled in the roll of free-
" holders for the ſhire of *Aberdeen*, and therefore ordained all of them
" to be added to the ſaid roll.

S

Act. *George Brown.* Alt. *Burnet, & J. Gordon.* Clerk, *Kirkpatrick.*

N° CXLVII. 4th *March* 1755.

## *SAMUEL AUCHINLECK*
## againſt
## *JAMES GORDON.*

*SAMUEL AUCHINLECK* brought a proceſs againſt *James Gordon*, for having uttered ſeveral defamatory and injurious expreſſions againſt him; and particularly ſetting forth, That *Gordon* aſked the purſuer's ſon, " whether he came with a ſtaff to murder him," adding, " that " the purſuer and his family ought to have their faces marked when they " offered to murder on the high-way; that they were a parcel of thieves, " robbers, murderers, and coiners of falſe money, and deſerved to be ba-" niſhed:" and the libel concluded for damages and expences of proceſs.

The defender *objected*, That this action being for ſlander and defamation could not be brought in the firſt inſtance before the Court of Seſſion, as the Commiſſaries were the only judges competent for queſtions of that kind.

The Lord Ordinary ſuſtained proceſs, and found the action competent; and, before anſwer, allowed a proof to both parties.

The defender applied by petition to the Lords, and *pleaded*, That, before the Reformation, Commiſſaries only, could judge in matters of ſcandal, and the civil courts were not even intitled to judge in theſe matters by review; for appeals from the Biſhop's courts were only competent to the Pope, or judges delegated by him.

After the Reformation, by ſtatute 1560, ratified Parl. 1581. *cap.* 115. all queſtions depending before the Commiſſaries, when their juriſdiction was abrogated, were allowed to be tried by the judges-ordinary: but ſoon after it was thought neceſſary, notwithſtanding the abolition of Epiſcopacy, to continue the office of Commiſſaries. Theſe Commiſſaries were named by the Crown, and veſted with the ſame juriſdiction that the antient Commiſſaries had.

By the ſtatute 1609, *cap.* 6. Biſhops were reſtored to their full powers, and their Commiſſaries were declared intitled " to judge in all cauſes " ſpiritual and eccleſiaſtical wherein the Commiſſaries then in office were " in uſe to decide." And by the ſame ſtatute, the Court of Seſſion is only impowered to judge in matters conſiſtorial, as a Court of review when the Commiſſaries of *Edinburgh* ſhould not do their duty, and to advocate from inferior Commiſſaries for iniquity. And that matters of ſcandal are conſiſtorial appears from the inſtructions to the Commiſſaries *anno* 1666, § 1. where ſuch queſtions are expreſsly enumerated amongſt other con-

 ſiſtorial

fiſtorial caſes. And Sir *George Mackenzie*, *Crim. B.* iii. *Tit.* 10. ſays expreſsly, " That the Biſhop's Officials are the only judges to verbal in-" juries, becauſe theſe verbal injuries are conſidered as ſcandals."

The reaſon why matters of ſcandal came to be appropriated to the juriſdiction of the Commiſſaries appears to be, that, in the early ages of our law, the criminal judges only interpoſed in violent breaches of the peace, leaving crimes and injuries of leſs importance altogether unpuniſhed. In rude and uncultivated ages, honour was a thing little underſtood, and verbal injuries made but ſlight impreſſions: but as injuries of this kind were contrary to the doctrines of Chriſtianity, they naturally fell under the obſervation of the clergy, who at firſt, probably, only admoniſhed thoſe who were guilty in that way, but by degrees came to inflict eccleſiaſtical cenſures; and at laſt, when they were allowed to hold courts, they added to that puniſhment a fine or mulct, which being ſometimes applied to the party injured, came to receive the name of damages, tho' it is evident that the fine could only be impoſed as a puniſhment of the crime, and to ſatisfy the reſentment of the party injured, and not to reſtore to him any patrimonial intereſt, as none could be loſt by the injury. And therefore, from the nature of the crime, as well as from the laws and practice whereby the juriſdiction of the Commiſſaries are eſtabliſhed, queſtions of this ſort can only be tried, in the firſt inſtance, before the Commiſſaries, and not before the Court of Seſſion.

*Obſerved* on the bench, That whatever was the antient practice, yet for ſome years paſt verbal injuries have been tried both before the Court of Juſticiary and Court of Seſſion, and even by Juſtices of Peace.

" The Lords refuſed the petition, and adhered to the Lord Ordinary's " interlocutor, finding that the action was competent before the " Court of Seſſion.

B

For the Petitioner, *Johnſton*.

N° CXLVIII. 5th *March* 1755.

## *DAVID SCOT*
againſt
## *PHŒBE FORBES.*

THE deceas'd *John Scot*, the purſuer's brother, diſponed in liferent to *Phœbe Forbes* his ſecond wife (as an additional proviſion to thoſe in her contract of marriage) " the manſion-houſe of *Hedderwick*, gardens of " the ſame, with that park called *Clayland*, conſiſting of about ten acres; " which liferent-right he binds and obliges him and his heirs to be good, " valid and ſufficient to her againſt all mortals."

The roof of the manſion-houſe was entirely ruinous; and the queſtion was, whether *John Scot* the heir, or *Phœbe Forbes* the liferenter ſhould be at the expence of repairing it.

The Lords, on the 28th of *January* 1755, found, " That the roof of " the main body of the houſe of *Hedderwick* muſt be ſufficiently re-" paired at the joint expence of Mr. *Scot* of *Hedderwick* and Mrs. *Phœbe* " *Forbes* the widow; and that he is obliged to contribute two thirds of " the

" the expence of ſaid reparation, and ſhe the one third thereof; and that " the materials of the preſent roof, and produce thereof, muſt be applied " towards ſaid repair; and that the ſaid repair ſhall not exceed the ſum of " *L.* 60 *Sterling* over and above the materials of the preſent roof; and " *ordained* the ſaid repair to be made by the ſaid Mr. *Scot* at the ſight of a " tradeſman to be named by the ſaid Mrs. *Phœbe Forbes* betwixt and the " firſt day of *Auguſt* next to come, and failing thereof *allowed* the ſaid Mrs. " *Phœbe Forbes* to make the ſaid repairs at the ſight of a perſon to be " named by the ſaid Mr. *Scot*, if he thinks fit to name any ſuch; and " failing ſuch nomination, the ſame to be made at the ſight of the Sheriff " of *Forfar*, or his Subſtitute; and the ſaid repairs being made, *found*, " that the ſaid Mrs. *Phœbe Forbes* is obliged to find caution in terms of the " act of parliament, and *decerned* and *found* moderate expences due to " the ſaid Mrs. *Phœbe Forbes*, and *ordained* her to give in an accompt " thereof."

Both parties reclaimed, and it was *pleaded* for the heir, That it was optional for him to deſert the houſe, and therefore he could not be bound to repair it. A liferent-right is only a ſervitude, and binds the fiar to no more than *nuda patientia*; ſo the fiar cannot be bound to repair. The civil law bound the liferenter to repair, and to find ſurety called the *cautio uſufructuaria*, to leave the ſubjects in as good condition as he found them. *Quoniam igitur omnis fructus rei ad eum pertinet, reficere quoque eum ædes per arbitrum cogi, Celſus ſcribit, l.* 7. § 2. *D. de uſu fructu.* The act 1491, *James* IV. *p.* 3. *cap.* 25. which is ratified by act 1535, *James* V. *p.* 4. *cap.* 15. bound the liferenter " not to waſte and deſtroy the ſubjects, but to " hold them in ſicklike kind as they are in at the time he gets and re- " ceives the ſame, he taking his reaſonable ſuſtentation or uſing in needful " things without deſtruction or waſting thereof."

*Pleaded* for the liferenter: That as the diſponer bound himſelf and his heirs to give her the liferent of a houſe, ſo he muſt have meant that houſe was to be made habitable. That indeed after it was made habitable, it was not unreaſonable ſhe ſhould bear the *minores impenſæ* for keeping it wind and water-tight, and ſhould find caution for that effect; but never could it be expected, that ſhe ſhould lay out the *majores impenſæ* of repairing a ruinous roof, far leſs of putting on a new one. This is expreſsly the doctrine of the civil law in the place above mentioned, where, to what is recited, it is added, *Hactenus tamen ut uſufructuarius ſarta tecta habeat, modica refectio ad eum pertineat.* And altho' it is there alſo ſaid, *ſi qua tamen vetuſtate corruiſſent, neutrum cogi reficere*, this was agreeable to the particular doctrine of the civil law, by which it was held, if the liferent of a houſe was given in legacy, and the houſe fell, the liferent determined; for the liferent of a houſe did not include the liferent of the area. But this is not held to be the law of *Scotland.* The acts 1491 and 1535 relate only to the not abuſing or waſting liferented ſubjects, by altering the form of buildings, plowing paſture grounds, or felling woods.

In this caſe the Court ſeemed to agree, that none of the parties were bound to put a new roof upon the houſe; ſo the queſtion came to be, In caſe the liferenter ſhould repair, how far ſhe could have repetition from the heir? Upon this the Court was almoſt equally divided: ſome were of opinion, that, if the liferenter ſhould repair the roof, ſhe and her heirs would at the end of the liferent have no further claim from the heir than *in quantum eſſet lucratus.* Others ſaid, this was entailing a law-ſuit.

Upon

Upon the 1ſt *March* 1755, the Lords found, " That neither Mr. *Scot*, " nor Mrs. *Phœbe Forbes*, are obliged to repair the roof of the houſe " in queſtion ; but that ſhe is intitled to repair the ſame, and that " the ſaid reparation, if made, ought to be at the ſight of the She- " riff of *Forfar*, or his Subſtitute, at whoſe ſight alſo the accompt " of expences of ſaid reparation is to be made up ; and found, That, " at the iſſue of the liferent, Mr. *Scot* is liable to repay to the heirs " of the liferentrix the whole expences of the ſaid reparation, con- " form to the accompts to be made up ; but, as to the expences of " proceſs, adhered to the former interlocutor."

And, upon a reclaiming petition by Mr. *Scot*, praying for an explication of ſome things in this interlocutor,

" Found, That the expence of repairs muſt not exceed eighty pounds " *Sterling* ; and that the liferentrix muſt find caution immediately " with reſpect to the gardens and incloſures, as alſo with regard to " the houſe, after the repairs are made, in the words of the act of " Parliament, and modify the account of expences given in to " *L.* 24 : 10 *s. Sterling*, and decern ; and alſo decern for the ex- " pences of extracting the decreet.

Act. *Lockhart*. Alt. *Wedderburn*. Clerk, *Kirkpatrick*.

N° CXLIX. 5th *March* 1755.

*JOHN MURRAY* of *Philiphaugh*

againſt

Doctor *JOHN NIELSON*.

*SAMUEL NIELSON*, at his death, left a diſpoſition of his lands of *Etrick-houſe* to certain truſtees for uſes. The diſpoſition contained procuratory of reſignation, and precept of ſaſine, in the uſual form. Doctor *Neilſon*, the defender, his immediate elder brother, was ſerved his heir of conqueſt in general. The truſtees obtained themſelves infeft baſe to hold of the heir ; and, for a ſum paid, they granted, in his favour, a diſcharge and renounciation, during his life, of the procuratory of reſignation, binding themſelves, during his life, neither to execute that procuratory, nor to obtain a charter of confirmation of their baſe-infeftment, nor of adjudication in implement of the diſpoſition. The Doctor produced to the freeholders of the county of *Selkirk* his brother *Samuel*'s titles, and his own general retour, together with the diſcharge and obligation above mentioned ; and was thereupon inrolled, as apparent heir of conqueſt to his brother.

*John Murray*, the purſuer, offered a complaint againſt this inrollment, and *objected* to it, 1*mo*, That an apparent heir to a naked ſuperiority cannot be ſaid to have ſuch poſſeſſion as ſeems to be required by the act 1681, *Charles* II. *p.* 3. *cap.* 21. namely, a poſſeſſion of the rents and profits.

2*do*, That *Samuel*, the predeceſſor, was denuded by the diſpoſition to the truſtees ; and that the effect of that diſpoſition could not be ſaid to be

be taken off by the diſcharge and renounciation which the truſtees had granted; for that an apparent heir can only be inrolled in reſpect of his predeceſſor's titles; whereas this is a new title in favour of the heir, which cannot aid the predeceſſor's title; and this ſeems to be admitted by the Doctor's paying a ſum in conſideration of it.

3*tio*, The renounciation of the power of uſing the procuratory, during the Doctor's life, is only a perſonal obligation upon the truſtees; it would not bind purchaſers; and, tho' it might make the truſtees liable in damages, yet it does not prevent even them from executing the procuratory, or from obtaining a charter of confirmation. In ſhort, the whole circumſtances ſhow this right of Doctor *Nielſon*'s to be nominal, fictitious, and created on purpoſe to enable him to vote for a member of Parliament.

*Anſwered* for Doctor *Nielſon*, to the *firſt* objection: That he is as fully in poſſeſſion as an apparent heir can be, and as a naked ſuperiority will admit of.

To the *ſecond*: That, by the law of *Scotland*, a diſpoſition does not denude the diſponer: he is held to be the vaſſal, until denuded by the infeftment of the diſponee; and, as ſuch, would be intitled to vote, were it not for the ſtatutes made, which appoint freeholders to take the oaths of poſſeſſion, and that they are under no obligation to convey their rights. For this reaſon, if a diſpoſition ſhall be repudiated or diſcharged, it is as much annulled, and the diſponer is as fully in poſſeſſion, and as little under any obligation to convey, as if the diſpoſition had never been made. And this rule is equally applicable, whether the diſpoſition is diſcharged, as to the whole ſubjects contained in it, or only as to part of them, whether both as to the ſuperiority and property, or as to the ſuperiority alone. Neither does it make a difference, whether this diſcharge be granted before or after the diſponer's death; for, in either caſe, 'tis not a new right, to which new titles muſt be made up, 'tis no more than a document that the poſſeſſion is continued, and that there is no longer an obligation to convey to another; and the heir's giving a conſideration for the diſcharge and obligation is no admiſſion that it is a new right.

To the *third*: That it is ſufficient, if the defender's right be properly eſtabliſhed, and cannot be lawfully deſtroyed or impaired. The law preſumes not any man's fraud: *quæ contra bonos mores ſunt, nec facere nos poſſe credendum eſt.*

" The Lords repelled the objections to the defender's qualification, and " found, That he is ſufficiently intitled to continue on the roll of " freeholders for the ſhire of *Selkirk*; and therefore diſmiſſed the " complaint." s

Act. *Montgomery*. Alt. *Ferguſon*. Clerk, *Forbes*.

N° CL. 5th *March* 1755.

Earl of *EGLINTON*

againſt

The JUSTICES of the PEACE for the County of *Air*.

THE Juſtices of the Peace for the county of *Air* ſummoned the colliers of the Earl of *Eglinton* to work on the highways, in terms of the act 16. Parl. 2. Seſſ. 1. *Charles* II. and of the act *5to Geo.* I. *C.* 29.; and, on their failure, fined them.

The Earl of *Eglinton* inſiſted, in a declarator, That the perſons employed in his collieries were exempted from all ſervice for the reparation of the highways; and he *pleaded*, That colliers are, by law, *adſcripti glebæ*; and, particularly, are, by the act 56. Parl. 1. Seſſ. 1. *Charles* II. obliged, under certain penalties, to work at the collieries to which they belong, *for all the ſix days of the week, except at Chriſtmas*. Now, it cannot be ſuppoſed that the legiſlature would thus bind colliers to one work, and yet call them away to another. The act 16. Parl. 2. Seſſ. 1. *Charles* II. reſpects *tenants, Cottars, and other labouring men:* theſe terms, according to their common acceptation, comprehend not colliers: were colliers diverted from their proper work for ſix days yearly, irreparable damage might enſue to their maſters; hence it is that the exemption here pleaded has been eſtabliſhed by univerſal cuſtom.

*Anſwered* for the defenders: Colliers are indeed bound to a conſtant attendance on the ſervice of their maſters; but this obligation exempts them not from any public ſervice to which the law may ſubject them. The ſtatutes contain no exception in favour of colliers; they reſpect all perſons who gain their livelihood by labour; they have been extended by the Court to ferrymen, and to the inhabitants of royal burroughs, 24th *July* 1750, *Hamilton* againſt *the Inhabitants of* Kirkcaldy, and ought, by parity of reaſon, to be extended to colliers. Neither will this be greatly prejudicial to their maſters, who, by paying the moderate legal compoſition, may have them exempted from all ſervice on the highways.

" The Lords found, That colliers, gateſmen, windlaſsmen, and watermen, are not comprehended or meant to be included in any of the acts of Parliament anent repairing the highways; and therefore the purſuers, the colliers, gateſmen, windlaſsmen, or any other the colliers, gateſmen, windlaſsmen, and watermen, belonging to the purſuer the Earl of *Eglinton*'s coal-works, are not ſubject or liable to give any ſervice or attendance at the repair of the highways within the county of *Air*, or to pay any ſums of money towards thoſe repairs in all time coming." D

Act. Sir *D. Dalrymple, Lockhart.* Alt. *W. Wallace* ſen. *Montgomery.* Reporter, *Milton.* Clerk, *Juſtice.*

N° CLI.

Nº CLI. 6th *March* 1755.

## *DAVID OGILVIE*

against

## *ROBERTSON* of *Redleikie.*

*OGILVIE* accepted a bill to the order of *Robertſon*, bearing for value; this bill was duly proteſted for non-payment, and the proteſt regiſtred. After the bill had lain over five years, *Ogilvie* brought a proceſs againſt *Robertſon* before the Baron-Bailie of *Alyth*, ſetting forth, That *Robertſon* having purchaſed ſome victual from *Ogilvie*'s brother, did, at the ſeller's deſire, pay part of the price to *Ogilvie* before receiving the victual, and took the bill in queſtion for the ſum, agreeing to return the bill when the victual ſhould be delivered: That the victual was ſoon after delivered; and therefore concluding, That the bill ſhould be returned. *Robertſon* having denied the libel, the Bailie allowed a proof by witneſſes; to which *Robertſon*, who was preſent, made no objection. The witneſſes depoſed in terms of the libel. The Bailie decerned *Robertſon* to deliver up the bill, and *Ogilvie* charged him for that effect; but went no farther in diligence. *Robertſon* obtained a ſuſpenſion; but did not intimate it till nine years thereafter; when, at the ſame time, he charged *Ogilvie* with horning to pay the bill. *Ogilvie* thereupon wakened the ſuſpenſion, and put up proteſtation for production thereof; and, on 7th *July* 1750, in common form, gave it out, with the proceſs of wakening, to be ſeen. *Robertſon* did not return it that Seſſion; but, in the inſuing vacation, proceeded to extreme diligence upon his horning; and, by a caption, obliged *Ogilvie* to pay the ſum in the bill with fourteen years intereſt. *Ogilvie* thereupon raiſed proceſs of oppreſſion and damages, ſetting forth theſe facts; and, further, alledging, as an aggravation of the oppreſſion, That, tho' *Robertſon* lived in his neighbourhood, and had a meſſenger at hand, yet he did nothing, till he found him in the market of *Perth*, 16 miles from his home; and there apprehended him by the caption, in order to diſtreſs him, and ruin his credit.

This proceſs being conjoined with the ſuſpenſion, it was *pleaded* for *Robertſon:* That the proof, brought before the inferior Court, was inhabile; for that a written obligation is not to be taken away by parole-evidence; therefore the proof was to be rejected. This being the caſe, argued that ſuſpenſion opened the Bailie's decreet, ſo that it could not ſtand way of diligence upon the bill, far leſs be a ground for a proceſs of oppreſſion and damages.

*Anſwered* for *Ogilvie: Robertſon* was preſent when the proof by witneſſes was allowed, and acquieſced in it; he does not even now pretend to ſay that he paid the whole price of the corn, over and above the ſum in the bill. 2*do*, A paſſed bill of ſuſpenſion, tho' it has the effect to ſtop diligence upon the decreet, whereof it is a ſuſpenſion, yet, until the reaſons of ſuſpenſion are diſcuſſed and ſuſtained, it does not reverſe, take away, or annihilate the decreet: and *Ogilvie* was not *in mora*; for, as ſoon as he knew of the ſuſpenſion, he did his part to have it diſcuſſed.

" The

" The Lords repelled the reaſons of ſuſpenſion, and found the letters " orderly proceeded; and found *Robertſon*, the ſuſpender, liable in " damages and expences to *Ogilvie* the charger." s

Act. *And. Pringle.* Alt. *A. Lockhart.* Clerk, *Gibſon.*

N° CLII. 6th *March* 1755.

*WILLIAM IRVINE* Merchant in *Lerwick*

againſt

*JOHN GEORGE OSTERBYE, RICHARD GILDART*, and others,

A *Norvegian* veſſel, *Knudſon* Maſter, ſtruck on the rocks of *Breſſey-ſound* in *Zetland:* the ſhip and cargo were adjudged a wreck by the Vice-admiral of *Zetland*, and by his authority expoſed to ſale; they were bought at an undervalue by *Irvine*; and it appeared that *Knudſon*, the Maſter, had diverted certain perſons from bidding at the ſale, by diſtributing a ſum of money among them; that *Irvine* made the purchaſe for the uſe of *Knudſon*; that, before the ſale, part of the cargo and the rigging had been brought on ſhore; and that, after the ſale, the ſhip was got off, and the reſt of the cargo ſaved.

*Irvine* afterwards purchaſed from *Knudſon* the ſhip and cargo thus ſaved, and granted bond for *L.* 920 *Sterling*, in part of the price: *Knudſon* aſſigned this bond to *Oſterbye*, a merchant in *Norway*; this aſſignation was held to have been granted for value, as it ſo bore, and as no legal evidence to the contrary appeared; *Oſterbye* brought an action againſt *Irvine* for payment of this bond.

*Gildart*, and others, merchants in *London*, were underwriters on the ſhip and cargo; and, on ſuppoſition of her having been a wreck, paid the loſs to the owners; but, having diſcovered the fact to be as here narrated, they brought an action againſt the owners and *Knudſon*, for repetition of the ſums ſo paid; they alſo arreſted the bond for *L.* 920 *Sterling*, in the hands of *Irvine*, as debtor to *Knudſon*.

A multiple-poinding having been raiſed by *Irvine*, the caſe reſolved into a competition for the ſum in the bond, between the inſurers and the onerous aſſignee.

*Pleaded* for *Oſterbye*, the onerous aſſignee: The rule of the civil law, That *dolus auctoris non nocet ſucceſſori ex titulo oneroſo*, prevails with us, in the caſe of one purchaſing a real eſtate from a perſon infeft, or moveables which the ſeller neither ſtole, nor got by robbery, or of one purchaſing bills of exchange for value; the ſame rule muſt obtain, by parity of reaſon, in the caſe of a fair purchaſer of perſonal rights; and therefore the fraud of *Knudſon* cannot affect the right of his onerous aſſignee in the bond: *Stair* indeed is of a different opinion, *Book* 4. *tit.* 40. § 21; but his aſſertion ſeems repugnant to the proviſo in the ſtatute 1621, which ſecures him who has fairly purchaſed any right whatever from the fraudulent aſſignee of a bankrupt; and to the deciſion, 1ſt *December* 1671, *Crichton* againſt *Crichton*, by which a perſonal deed, reduceable *ex capite fraudis*, againſt the firſt acquirer, was found valid in the perſon of one purchaſing fairly from him: theſe authorities prove, That, by the law of *Scotland*, fraud

fraud is underſtood to be a perſonal objection only, and that, with reſpect to all rights, whether real, or of moveables, or conſiſting in *nomina debitorum*.

*Pleaded* for *Gildard* and the other inſurers: For the ſecurity of our land-rights, action is denied againſt the purchaſer of a real eſtate, on account of the fraud of his author; fraud alſo in the ſeller of moveables affects, not him who purchaſes *bona fide:* the ſame is the rule in bills of exchange, which are held as equivalent to ready money. In theſe caſes the neceſſities of mankind, and the nature of commerce, require this rule: but the caſe of bonds is different; they are not the proper ſubjects of commerce, they are ſecurities for money, and are tranſmiſſible only by the form of aſſignation and procuratory: with reſpect to ſuch perſonal rights, the rule in law is, That *aſſignatus utitur jure auctoris*; as, with reſpect to them, the backbond of the cedent affects the onerous aſſignee, ſo alſo muſt his fraud; as the inſurers might vindicate the ſhip and cargo, were they ſtill extant, they have right to the bond, being the price of the ſhip and cargo; and, as they would have this right in competition with *Knudſon* the cedent, they muſt alſo have it in competition with *Oſterbye* the aſſignee. The opinion of *Stair* is in point; and ſo the Court found 1742, *Burden* of *Latterpin* againſt *Whiteſoord* of *Dunduff*. The argument drawn from the exception in the act 1621, in favour of purchaſers from the interpoſed perſon, is not concluſive; for that, as the remedy introduced by by that act is wholly ſtatutory, and may not be extended to other caſes, ſo neither may the exception: the interpoſed perſon partakes not always of the fraud of the bankrupt; and the Legiſlator did not think proper to extend the ſtatute againſt third parties purchaſing *bona fide* from him. Neither is the caſe of *Crichton* in point; it related to a tack aſſigned for onerous cauſes; on which tack both the cedent and the aſſignee had poſſeſſed; the Court conſidered it as of the nature of a real right, and gave judgment accordingly.

" The Lords preferred the inſurers to the bond of *L.* 920; but re-
" ſerved action to *Oſterbye* againſt *Irvine* for payment of the price in
" the ſaid bond." D

For *Irvine*, *Hamilton Gordon*. For *Oſterbye*, *A. Lockhart*. For the Inſurers, *Miller*.

CLIII. 7th *March* 1755.

*JOHN HERRIES* Merchant in *Rotterdam*

againſt

*ROBERT* and *JOHN LIDDERDALES* Merchants in *London*, and *THOMAS CARLISLE* Writer in *Dumfries* their Factor.

*JOHN HERRIES* merchant in *Rotterdam*, a native of *Scotland*, became debtor to *Robert* and *John Lidderdales* merchants in *London* for upwards of *L* 1000 *Sterling*. In a letter addreſſed to them the 10th *September* 1754, he acknowledges he was their debtor, but ſays not for how much, begs a little delay until effects which he had in *Scotland* ſhould come to hand; and adds, " That if theſe effects did not ſoon come to " hand, he would go to *Scotland* for a few weeks to look after his affairs

" there, but promiſed to acquaint them before he ſet out, and with whom " he left his procuration."

Some time after the date of this letter, without giving any further notice to Meſſ. *Lidderdales*, *John Herries* came to *Scotland*, and reſided during moſt of the winter at *Edinburgh*, attending a ſuit he had depending before the Court of Exchequer, concerning the ſeizure of a ſhip and cargo belonging to him, in which ſuit he prevailed. In *February* 1755, he went to *Dumfries* to ſee ſome relations in that place, and Meſſ. *Lidderdales* getting notice that he was there, they employed *Thomas Carliſle* to recover payment of the debt due to them.

*Thomas Carliſle*, in name of *Robert* and *John Lidderdales*, applied by petition to the Sheriff-Subſtitute, ſetting forth, " That *John Herries* was debtor to them in *L* 1461 *Sterling*; that he had left *Holland* without acquainting them, and was lurking in this country where he had no ſettled reſidence; that they had reaſon to ſuſpect he was but in indifferent circumſtances, and intended to conceal himſelf from them in order to avoid payment of the debt; and therefore praying a warrant to apprehend and incarcerate him until he ſhould pay the ſum, or find caution *judicio ſiſti et judicatum ſolvi*.

The Sheriff granted warrant for bringing *John Herries* before him, and upon his appearing and acknowledging that he was owing a debt to the petitioners, and that he could not then either pay it or give ſecurity, the Sheriff ordained him to be incarcerated until he ſhould find caution *judicio ſiſti et judicatum ſolvi*.

*John Herries* preſented to the Court of Seſſion a bill of ſuſpenſion and liberation, and at the ſame time a ſummary complaint againſt the defenders, complaining of the ſaid incarceration, and *pleaded*, That the warrant of commitment was illegal and oppreſſive; for that, as he was a native of *Scotland*, and had effects in it, there was no occaſion for a perſonal arreſtment *juriſdictionis fundandæ gratia*; and that by the law and practice of this country, caution *judicio ſiſti et judicatum ſolvi* could not be demanded, except before the Admiral-Court in maritime cauſes, or unleſs there ſhould appear ſpecial circumſtances which give ground to ſuſpect fraud. Such circumſtances do not occur here; for it was not true that he was ſkulking or ſecreting himſelf, being every day at the market croſs of *Dumfries*, and it was not alledged in the petition that he was *in meditatione fugæ*, which is abſolutely neceſſary in order to warrant a ſummary incarceration in caſes not maritime.

*Anſwered* for the defenders: *Firſt*, That it is by no means a ſettled point whether natives who have gone abroad *animo remanendi*, are ſubject to the juriſdiction of the Courts in this country, *ratione originis*, or whether an *arreſtum* be not neceſſary to found the juriſdiction? *2dly*, That it is foreign reſidence, without reſpect to the origin, which makes it proper to indulge a creditor with ſummary execution againſt his debtor, when he is found in a country where he does not reſide; and that there was no occaſion to alledge and prove a *meditatio fugæ* againſt one who has his reſidence in another country, in order to obtain a ſummary commitment; for his taking up no reſidence is ſufficient evidence of his intention to depart. Lord *Stair*, *Book* 4. *tit.* 47. § 23. obſerves, " Captions are alſo " granted, without a preceeding charge, by the Lords, upon ſpecial occa- " ſions; as if parties be ſuſpect to leave the country, and have no viſible " eſtate in it." And he likewiſe obſerves, " That any Judge Ordinary

" may

" may ſeize upon perſons for their debts, in their eſcape out of the king-
" dom, or in clear evidence of their going preſent about the ſame." And gives this reaſon for the practice in the Judge-Admirals of obliging defenders to find caution *judicio ſiſti et judicatum ſolvi*; " becauſe his juriſdiction is " moſt converſant about ſtrangers." And, as there is the ſame reaſon for obliging a *Scots* man, who reſides abroad, to find caution, as there is for obliging a foreigner to do it; ſo there is leſs hardſhip in obliging a *Scots* man to do it; becauſe he has a greater opportunity of finding friends who will be caution for him.

*Obſerved* from the bench: That an arreſtment *juriſdictionis fundandæ gratia* is uſual in moſt countries, and in our country; but, to oblige a defender to find caution *judicatum ſolvi*, is not uſual, except in maritime cauſes before the Admiral-Court: That it ſeemed unreaſonable one ſhould be obliged, at the commencement of an action, to give the purſuer more ſecurity than he had before; and that it would be dangerous to commerce and to perſonal liberty, if a debtor were always obliged, when found in a foreign country, to find caution *judicatum ſolvi*.

" The Lords granted warrant to ſet the complainer at liberty, upon his
" finding caution *judicio ſiſti* to any action to be brought againſt him,
" within ſix months, at the inſtance of *Robert* and *John Lidderdales*,
" before any competent Court." B

Act. *Lockhart.* Alt. *J. Ferguſon.* Clerk, *Pringle.*

N° CLIV. 21ſt *June* 1755.

*JOHN HART* Merchant in *Warrington*

againſt

*JAMES GLASFORD* Merchant in *Glaſgow.*

*WARNOCK*, merchant in *Glaſgow*, drew a bill upon *Smith*, merchant in *London*, bearing value in his hands, and payable forty days after date to *Glaſford*, or order.

*Glaſford* indorſed this bill to *Hart*, for value: before the bill became due, *Warnock* died, being at that time, as was contended, inſolvent. The bill, after various indorſations, was, on the third day after the day of payment, indorſed at *Liverpool* to *Barclay* merchant in *London*; *Barclay*, without delay, demanded payment from *Smith*; and, on his refuſal to pay, took a proteſt in common form. It appeared, from an affidavit afterwards made by *Smith*, that he did not refuſe payment, becauſe the bill was over-due, but becauſe he had not value in his hands.

*Hart*, the firſt indorſee, upon intimation of the diſhonour, retired the bill, and inſiſted in recourſe againſt *Glaſford*, the firſt indorſer.

*Pleaded* for *Glaſford:* The bill not having been preſented for acceptance, till after the expiry of the days of grace, was not duly negotiated; and therefore, by the cuſtom of merchants, and the deciſions of this Court, no recourſe can be allowed.

*Pleaded* for *Hart:* Regular negotiation is required in bills, that the drawer may be thereby warned againſt truſting the intended accepter, who has refuſed to obey his mandate, or becauſe the neglect of the porteur may

may prejudice the drawer: theſe reaſons apply not to the preſent caſe; for that *Warnock*, the drawer, had no money in the hands of *Smith*, nor afterwards remitted any to him. Neither could *Glasford* ſuffer any damage from the neglect of negotiation; he may ſtill affect the eſtate of *Warnock* in common with the other creditors of *Warnock*; and, had the bill been duly negotiated, he could not have had any preference; as therefore the neglect of negotiation could not poſſibly affect the intereſts of the parties concerned, recourſe is ſtill due to the porteur.

" The Lords found no recourſe due." D

For *Hart*, Sir *D. Dalrymple*. Alt. *Lockhart*.

N° CLV. 2d *July* 1755.

*MARY COLLINS* and her Truſtees

againſt

Lord *BOYD*.

*WILLIAM* Earl of *Kilmarnock*, grandfather to the defender, by his bond, dated in the 1714, proceeding upon the narrative of love and favour, obliged himſelf " to pay to his uncle Captain *Charles Boyd*, " and *Katharine Van Reeſt* his ſpouſe, and longeſt liver of them, the ordi- " nary annualrent of 6000 merks, and to the children procreated or to be " procreated between the ſaid Captain *Charles Boyd* and his ſpouſe, the " principal ſum of 6000 merks, at the firſt term after the death of the " longeſt liver of the ſaid *Charles* and his ſpouſe, *proviſo*, That, if there " ſhould be no children ſurviving at the ſaid term of payment, then the " bond, in ſo far as conceived in favours of children, to be void and " null."

Captain *Charles Boyd* ſurvived his wife, and died in the year 1736, leaving iſſue of the marriage, a ſon and daughter, *Malcolm* and *Jean*; *Jean*, during the life of her father, became a profeſſed Nun in the Cloiſter of the penitent *Capuchines* at *Bergen* St. *Verom* in *French-Flanders*; *Malcolm* intermarried with the purſuer *Collins*; and, by tripartite indenture made upon their marriage, he transferred the Earl of *Kilmarnock*'s bond, and the ſum of 6000 merks, thereby ſecured to certain truſtees for particular uſes; and, *inter alia*, in truſt, for paying over, after his death, the 6000 merks, as the ſame ſhall be received to *Mary Collins*, in caſe ſhe ſhall ſurvive him.

*Malcolm* having died, his widow and the truſtees purſued Lord *Boyd*, who had become bound for his grandfather's debts, for payment of the whole 6000 merks; alledging, That *Jean Boyd*, by her profeſſion of a Nun, and vows of poverty, chaſtity, and obedience, was incapable to take or hold any civil right, that ſhe became *civiliter mortua*; and therefore the whole obligation for the 6000 merks, payable to the children of *Charles Boyd* and his wife, ſurviving their parents, veſted in *Malcolm*, as the only ſurviving child, in the ſame manner as if *Jean* had been naturally dead before her father; in which caſe, neither ſhe nor her heirs would have had any right in this ſum.

And,

And, in ſupport of this plea, it was further *contended* by the purſuers: That, by the very conſtitution of Monachiſm, and by the vows of poverty taken by all profeſſed Monks and Nuns, they neither could have property, nor enjoy any civil right. This is the rule of the civil law, *Authen. ingreſſ. C. De ſacroſan. eccleſ.* aſſumed into the canon law, *tit. De ſtatu monachorum, C.* 6. and, in every queſtion ſuch as this, the canon law was undoubtedly the law of *Scotland* before the Reformation. *Craig* expreſsly eſtabliſhes, by his opinion, the doctrine here maintained, *lib.* 1. *dieg.* 13. § 20. *Monachi enim nihil in bonis ratione ſuæ profeſſionis habent, in feudum non concedunt.* And again, *dieg.* 14. § 11. *Monachus apud nos, cum non ſolum ſervo equiparetur, ſed etiam mortuus mundo dicatur, neque novi feudi, neque paterni eſt capax.* And, in *lib.* 2. *dieg.* 18. § 14. he lays it down as an invariable rule, *Monachum, qui ſeculo renunciaverit, ad ſucceſſionem non admitti.* And, tho' he ſpeaks of feus, yet the reaſons apply with as much force to the caſe of moveables, and do equally prove, that a profeſſed Monk or Nun can enjoy property of no kind.

And, tho' the law varies in different Popiſh countries, in ſome, the Monk acquiring to the Monaſtery, as, by the civil law, a ſlave acquired to his maſter; in others, the eſtate devolving to the heir *ab inteſtato*, as if the Monk was naturally dead; yet the laws of all countries do agree in this, That the Monk cannot enjoy. By the laws of *England* and *France*, the two great ſources from which the law of *Scotland* is derived, profeſſion, as a Monk was deemed equal to natural death, and place was given to the heir *ab inteſtato*. *Coke* upon *Littleton*, *F.* 132. *Perez. in Cod. L.* 1. *tit.* 2. N° 20. 21. This, there is all reaſon to believe, was alſo the law of *Scotland* before the Reformation: but, ſuppoſing the other cuſtom ſhould be thought to have prevailed, and *Jean Boyd* conſidered as acquiring to the Monaſtery, yet that will make no variation in the argument. Our law, ſince the Reformation, will not allow a foreign Monaſtery to take any eſtate in *Scotland*, whether real or perſonal; a foreign Monaſtery is undoubtedly an *alien*; it is no body, politic or corporate, to take in the right of any of its Nuns: and, more particularly, they are effectually barred, by the act 1700 for preventing the growth of Popery, which enacts, "That all diſpoſitions, *&c.* in favours of Cloiſters, or any "other Popiſh ſocieties, or to any perſon for their behoof, ſhall be void "and null, in ſo far as concerns the ſaid Cloiſters or Popiſh ſocieties; but "the ſame ſhall, *ipſo facto*, fall and accreſce to the neareſt Proteſtant re- "lation to the giver, at the time when the ſaid diſpoſition, *&c.* was "deſtinated to be effectual." If therefore *Jean Boyd*'s intereſt in this bond muſt neceſſarily fall to the Monaſtery, it is undoubtedly voided by this ſtatute, and *Malcolm*, the neareſt Proteſtant heir, is veſted in the right of her the giver; or, if Lord *Kilmarnock* ſhould be thought to be the giver, in the meaning of the ſtatute, ſtill this defender can have no right, as he is excluded by his father's attainder.

*Jean Boyd* being thus barred from having any intereſt in this bond, both by the common law, and by ſtatute; ſhe being in the ſtate of an alien, incapable to take, as well as the Popiſh Monaſtery, in right of her; *Malcolm*, and the purſuers, in his right, are intitled to the whole ſum. Had the grant been *nominatim* in favours of *Jean*, it muſt be held *pro non ſcripto*; but, as no part of it is payable to *Jean nominatim*, but the whole to the children of the marriage in general, any one child is intitled to take the whole ſum in his own right, if no other child concurred with him, whether ſuch

want of concurrence happened by non-exiſtence of other children, or by their being debarred by legal impediment.

*Anſwered* for the defender: *Jean Boyd*, from the day of her birth, was creditor to Lord *Kilmarnock* in a proportional part of the ſum in queſtion; and no forfeiture of this *jus crediti* can operate, *ipſo jure*, without a declarator, to which ſhe herſelf muſt be made a party. Defences unknown to the defender may be competent to her; ſhe may have objections to the validity of this ſuppoſed profeſſion; may be releaſed from her vows; may quit the Monaſtery without being ſo releaſed; may abjure Popery; may embrace the Proteſtant religion; and, by all theſe means, be reinſtated in her civil rights.

And, tho' this proceſs were ſufficient to forfeit her of her right, yet ſhe is no party to it; ſhe was not called in the original proceſs: and, tho' that defect was endeavoured to be ſupplied, by citing her in a multiplepoinding, raiſed in name of the defender, yet that is not ſufficient; *Jean* was born abroad, conſequently is no native of this country: nor has ſhe a *forum ratione originis* here, therefore is not amenable to this Court, as no method has been uſed to found a juriſdiction by arreſtment or otherways.

2*do*, *et ſeparatim*, It is true, That, by the rules of the civil and canon law, religious perſons profeſſed were incapable to hold, but they were not incapable to take; the Monaſtery, as a body corporate, took in right of its ſeveral members; in the ſame manner as by the treaſon-laws of *Great Britain*, tho' an attainted perſon cannot hold, he can acquire to the King. The civil and canon laws, in all queſtions of this kind, were held, before the Reformation, to be the law of *Scotland*, when not altered by poſitive conſtitutions, or eſtabliſhed uſage; and, altho' other nations have departed from theſe laws, and have preferred the heir *ab inteſtato* to the Monaſtery; the law of *Scotland* has not done ſo; and the laws of other countries have no authority in *Scotland*; and therefore, if this queſtion had occurred before the Reformation, when theſe religious houſes had the protection of the law, the Monaſtery would have acquired.

But, more particularly, ſince the Reformation, the law of *Scotland*, with regard to rights which ariſe from the *Roman* Catholic religion, is totally changed; that religion being now ſuppreſſed, every right conſequential thereof is at end. There is no diſtinction betwixt *Religious* of one profeſſion and another; they have no *nomen juris* here; the profeſſion itſelf is diſallowed; and it has been the care of the Legiſlature to regulate, by particular ſtatutes, the rights of ſucceſſion, acquiſition of property, &c. ſo as moſt effectually to prevent the growth of Popery; but no diſtinction is made or implied in theſe ſtatutes betwixt *Profeſſed Religious*, and *others* of the Church of *Rome*; neither was their occaſion for ſuch diſtinction, as the law now ſtands reformed.

But the law, however juſtly ſevere againſt *Roman* Catholics ſince the Reformation, has not carried its rigour ſo far as to refuſe them the common privileges of mankind; *Jews*, and even Infidels, are allowed the benefit of trade with us; the law maintains them in every commercial right and privilege, and makes bills and bonds effectual to them. *Roman* Catholics are not in a worſe ſituation; and, whether particulars, or Monaſteries, would have action for the price of goods ſold, or for payment of bills or bonds granted them. The ſubject at preſent in diſpute, is a ſum of money contained in a perſonal bond: That *Roman* Catholics in general can hold ſuch rights, is indiſputed: That they can maintain action for payment

ment of ſuch ſums is equally certain; and, as the law now knows no diſtinction between one *Roman* Catholic and another; and, before the Reformation, the neareſt of kin did not take, as in place of the Monaſteries: in every view of the caſe, there is no foundation for the purſuer's demand.

To the argument drawn from the ſtatute 1700, it is *anſwered*: 1*mo*, The ſtatute refers only to deeds granted directly to theſe Popiſh ſocieties, or, under cover, to others for their behoof; neither of which is the caſe here; for, at the date of the bond, *Jean Boyd*, if then born, was an infant; ſo it could not be foreſeen that ſhe was to become a Nun. 2*do*, Suppoſing ſhe was to be conſidered as an interpoſed perſon for the behoof of the Monaſtery, the devolution provided by the ſtatute is not in favours of the neareſt Proteſtant heir of the donee, but of the donor; in this caſe, the Earl of *Kilmarnock*, and, under this character, *Malcolm Boyd* never could claim.

It was *obſerved* on the bench, at adviſing the cauſe: That, altho' *Jean Boyd*, not being born in *Scotland*, has no *forum originis* here; yet, as the ſum in queſtion is a *Scots* debt, and the debtor in *Scotland*, the matter falls to be determined by the rules of the law of *Scotland*, and the Nun is amenable here, and is properly called by the multiple-poinding; and, as ſhe had it in her power to claim when ſhe pleaſed, if any religious notion hindred her, no other perſon, not having right, could claim.

"The Lords repelled the objection to the citation of *Jean Boyd*, and "found, That ſhe is a proper party in this proceſs; but adhered to "their former interlocutor, ſuſtaining the defence, That the purſuer "has only right to 3000 merks of the ſum purſued for." w. s.

Act. *Macqueen*, & *Advocatus*. Alt. *Lockhart*. Clerk, *Kirkpatrick*.

N° CLV. 6th *July* 1755.

*FORBES* of *Culloden*, and others,

againſt

The Repreſentatives of *DAWSON* of *Hempriggs*.

IN the ranking of the creditors of *Clava*, it was *objected* to an adjudication, That it proceeded upon decreets of conſtitution, taken againſt an infant grandſon, upon a general charge to enter heir, not to his grandfather, who was the debtor, but to his father, againſt whom the debts had never been conſtituted.

*Pleaded* for the *adjudger*: That the ſummons of conſtitution did particularly ſet forth the grounds of debt, *viz.* bonds and bills granted by *Hugh Roſs* of *Clava* in the 1716; and, tho' by miſtake he is called the defender's father, whereas truly he was his grandfather; yet, as both were of the ſame name, that erroneous addition, with reſpect to the relation he ſtood in to the defender, cannot hurt the diligence, he being ſufficiently deſcribed as granter of the bonds and bills; and, as the defender knew this deſcription could only apply to his grandfather, he was therefore fully certiorated of the perſon to whom he was to enter by that deſcription; and *utile per inutile non vitiatur*. 2*do*, *Hugh Roſs* the father was liable paſſive to the grandfather's debts; and, tho' the grandſon had only been charged to

to enter heir to the father; yet he would, by not renouncing, have become liable for all the debts due by the father, whether of his own contracting, or as repreſenting the grandfather. 3*tio*, At leaſt the adjudication ought to be ſuſtained as an adjudication *cognitionis cauſa*, agreeable to the deciſion 27th *February* 1684, *Dunlop* againſt *Brown*, obſerved by Preſident *Falconar*, and to the Judgment given in a late caſe, in the ranking of the creditors of *Kinminity*.

*Anſwered* for the other creditors: That there was undoubtedly a very material error in the form of leading of this diligence, which muſt be fatal to it, in a competition among creditors; and that there was ſomething more here than a miſtake of the deſignation; for, in the letters of ſpecial charge, which followed upon the decreets of conſtitution, the grandſon is charged to enter heir to both father and grandfather. To the *ſecond:* That the paſſive title there mentioned might have availed to eſtabliſh theſe debts *paſſive* againſt the father, either upon a charge to enter heir, or upon a proof of the paſſive titles; but they, having never been conſtituted againſt him, could not, by any form known in the law, be transferred againſt the infant grandſon upon a general charge to enter heir to him. To the *third:* That the caſes quoted are foreign to the purpoſe; in them the decreets of conſtitution were in every reſpect regular and formal, but were obtained againſt infants in abſence, who were therefore intitled to be reponed, in ſo far as they had not renounced; but no farther, as upon a renounciation being produced, decreet of conſtitution muſt have gone forth againſt them: but here the decreets of conſtitution are *funditus* void, as proceeding upon an erroneous general charge.

" The Lords found the decreet of conſtitution void, and, conſequently,
" the adjudication following thereon null. W. S.

Act. *Lockhart.* Alt. *Brown, & Ferguſon.*

N° CLVI. 7th *July* 1755.

## TRUSTEES of *THOMAS RENTON*
againſt
## *RORERT BAILLIE.*

SIR *Thomas Renton*, a *Scots* man, went to reſide at *London* in the end of his life; and, having large ſums lying at intereſt in *Scotland*, he granted a factory to *James Baillie* writer to the ſignet, to uplift his intereſts for him.

*Baillie* was occaſionally at *London* in the year 1733, when he made up, along with Sir *Thomas*, an accompt of his intromiſſions, and of the payments he had made; at the foot of which accompt, there was a docquet ſigned by them both, in which *Baillie* acknowledged himſelf debtor in the ſum of *L.* 108 : 16 : 10 *Sterling:* and, of the ſame date, he granted a promiſſary note, payable in *London* a ſhort time after to Sir *Thomas*, for the ſaid ſum, bearing to be for the balance of accompts fitted betwixt them of that date.

Immediately

Immediately after, *Baillie* returned to *Scotland*, and was never in *England* again, nor had he any further clearance of accounts with Sir *Thomas*.

In the year 1751, the truſtees of *Thomas Renton*, ſon and heir of Sir *Thomas*, purſued *Robert Baillie*, ſon and heir of *James Baillie*, for payment of the above promiſſory note.

*Pleaded* for *Robert Baillie:* As both the *locus contractûs* and the *locus ſolutionis* was in *London*, the note falls to be regulated by the law of *England*; in which light, the ſix years preſcription, contained in the *Engliſh* ſtatute of limitations of the 21ſt *James* I. *cap.* 16. is a bar to the action.

*Pleaded* for the truſtees: 1*mo*, As the note in queſtion was granted for annualrents of ſums uplifted by *James Baillie*, as factor for Sir *Thomas Renton* in *Scotland*, it was a *Scots* debt, and therefore ought to be regulated by the law of *Scotland*.

2*do*, If it fell to be regulated by the law of *England*, then, as *James Baillie* went out of *England* into *Scotland* immediately after granting the note, he falls under the exception contained in the act of the 4th of *Queen Ann*, *cap.* 16. § 19. importing, That the preſcription ſhall not run in favour of a defender, *during the time he is beyond ſeas.*

*Anſwered* for *Robert Baillie*: The exception in the act of the 4th of *Queen Ann*, relates to defenders gone beyond ſeas, but not to defenders gone into *Scotland*.

*Replied* for the truſtees: The exception contained in the act of the 4th of *Queen Ann* being an equitable proviſion, ought to have been an equitable interpretation, in which view, it would fall to be extended equally to thoſe retired into *Scotland*, as to thoſe gone abroad; for the only reaſon why preſcription is refuſed to a defender beyond ſeas, is, That the creditor has not an opportunity of ſueing him in *England*; but neither has he ſuch opportunity when the defender retires into *Scotland*.

Such extenſion will be agreeable to the analogy of interpretation, on the exception contained in this ſtatute.

*Jerſey* and *Guernſey*, in the letter of the exception, are beyond ſeas; but, in the interpretation of it, they are not. Preſcription is ſtill allowed, in the law of *England*, to run in favours of a debtor retired into either of theſe iſlands, tho' both are beyond ſeas; it is then the ſpirit, and not the letter of the ſtatute that is to be attended to.

" The Lords found action lay on the note." J. D.

Act. *J. Dalrymple.* Alt. *Hamilton Gordon.* Clerk, *Forbes.*

## N° CLVII. 9th *July* 1755.

### Ranking of the Creditors of *Bonjedburgh.*

IN the year 1739, *George Douglaſs* granted an heritable bond over his lands of *Bonjedburgh*, for infefting Lord *Cranſton* in an annualrent of *L.* 120, and for infefting him in the property of the lands themſelves, for payment to him of the ſum of *L.* 2400: infeftment followed.

Soon after, Lord *Cranſton* and *George Douglaſs* granted an heritable bond to *James Bogle* for *L.* 2000 *Sterling*; and, for his further ſecurity, Lord *Cranſton*, in the ſame bond, diſponed to him his heritable bond on the lands of *Bonjedburgh*.

This conveyance was conceived in the following form, he therein *ſells*, *annailzies*, and *diſpones* to *James Bogle* heritably, and under reverſion, not only all and haill an yearly annualrent of *L.* 120 *Sterling*, but alſo the property of ſaid lands, for further ſecurity and payment of the aforeſaid accumulate principal ſum of *L.* 2400, *&c.*; and that, in ſo far allenarly as concerns, or may be extended to the aforeſaid ſum of *L.* 2000 principal, *L.* 400 penalty, and annualrents that ſhall happen to fall due on ſaid principal ſum of *L.* 2000, and no further; and, for ſecurity whereof, this preſent right is granted, and no further. Theſe qualifications are repeated in the procuratory of reſignation, and precept of ſaſine. The clauſe aſſigning the heritable bond is qualified in the ſame manner, ſurrogating and ſubſtituting *Bogle* in the right of Lord *Cranſton*, in ſo far allenarly as concerns the ſum of *L.* 2000, *&c.* And the whole concludes with this proviſion, That this preſent right and diſpoſition, annualrent, lands, and others above diſponed in ſecurity, ſhall be redeemable by payment making to *James Bogle* of the principal ſum of *L.* 2000 *Sterling*, annualrents thereof that ſhall become due, and liquidate penalties engaged therefore; and that thereupon our ſaid former right and infeftments ſhall revert to us, as if this preſent right and diſpoſition had never been made: infeftment followed.

*Bogle*'s debt coming into the perſon of Lord *Caſſilis*, he, in the year 1747, adjudged from Lord *Cranſton* this heritable ſecurity upon the eſtate of *Bonjedburgh*.

*George Douglaſs* having died, his apparent heir brought a ſale of his eſtate; *Archibald Jardine* became purchaſer in *March* 1751, and granted bond for the price, payable at *Martinmaſs* following to the apparent heir and his predeceſſor's creditors, as they ſhould be ranked.

In *April* that year, *John Anſlie* and others, perſonal creditors of Lord *Cranſton*, arreſted, in the hands of *Jardine* the purchaſer, the bygone annualrents due to Lord *Cranſton* on his heritable bond, amounting to *L.* 820.

In *June* thereafter, Mr. *Wauchop* of *Edmonſton* and the Maſter of *Roſs* became ſurety for Lord *Cranſton* in a debt of *L.* 600; and, for their relief, he conveyed to them his ſecurity in the lands of *Bonjedburgh*, in the ſame form in which it was conveyed to him: infeftment followed.

*Jardine* brought a multiple-poinding, in which Lord *Caſſilis* was preferred on his *L.* 2000, and *L.* 551 of annualrents then reſting: but then a competition aroſe betwixt Mr. *Wauchop* and Mr. *Roſs*, the diſponees of Lord *Cranſton*, on the one hand, and the arreſting perſonal creditors of Lord *Cranſton* on the other.

The diſponees *objected* to the arreſters: *Firſt*, That their diligence of arreſtment was inept: and *next*, That Lord *Caſſilis*, in order to be paid his *L.* 2551 of principal and annualrents, ſhould be ſuppoſed to have drawn, *firſt*, all the annualrents then due on *Bonjedburgh*'s bond, and *next*, as much of the principal of the bond itſelf as would have extinguiſhed his debt; in which caſe, the diſponees would have drawn their payment out of what remained of the principal.

The

The arreſters, on the other hand, *contended:* That Lord *Caſſilis* ſhould be ſuppoſed to draw his payment proportionally out of the principal ſum, and out of the annualrents due to Lord *Cranſton*, according to the proportion that the ſaid two ſums bear to each other; in which caſe, a certain portion of the annualrents would have been left for them to affect.

*Pleaded* for the diſponees, in ſupport of the *firſt* objection:

By Lord *Cranſton*'s diſpoſition to *Bogle*, now in the perſon of Lord *Caſſilis*, the right of the annualrent, conſtituted in favours of Lord *Cranſton*, and the diſpoſition of the property of the lands of *Bonjedburgh*, were transferred from him, and fully veſted in Lord *Caſſilis*, under reverſion of Lord *Cranſton*; but, as long as Lord *Caſſilis's* infeftment ſtood unredeemed, there was nothing for Lord *Cranſton*'s creditors to take, but his right of reverſion, which was not the ſubject of an arreſtment at all, but only of an adjudication or voluntary conveyance.

If Lord *Caſſilis*, in place of the voluntary right from Lord *Cranſton*, had, in payment of his debt of *L.* 2000 *Sterling*, adjudged the bond from Lord *Cranſton*, and had been infeft, the adjudication would have denuded Lord *Cranſton* of the whole ſum, nothing would have remained with him, but the reverſion; and his voluntary denuding himſelf, by a conveyance of the whole to Lord *Caſſilis*, cannot have a leſs effect.

In ſupport of the *ſecond* objection, *pleaded* for the diſponees:

When a partial payment is made to a creditor, by one who owes him both principal and annualrents, the payment is always imputed to extinguiſh, in the firſt place, the annualrents. Either in an arreſtment of a moveable debt, or in an adjudication of a real one, any payment made by the debtor will be conſidered as made firſt out of the annualrents due by him, and the reſidue out of the principal debt due by him. If this is the rule in voluntary payments, and in payments on execution, payment by decreet of a Court muſt, in the ſame manner, be deemed made to Lord *Caſſilis*, firſt out of the annualrent, and the reſidue out of the principal ſum.

*Anſwered* for the arreſters, to the *firſt* objection: The conveyance of the bond from Lord *Cranſton* bears only to be in ſecurity, in ſo far as concerns the principal ſum of *L.* 2000 *Sterling*, penalty, and annualrents, that ſhall be due on that ſum; it ſurrogates *James Bogle* in the right of Lord *Cranſton*, in ſo far allenarly as concerns that ſum; and, on the payment of *L.* 2000 *Sterling*, annualrents, and penalty, the right and infeftment is to revert to Lord *Cranſton:* there is no power given to *Bogle* to uplift more than the ſum of *L.* 2000, annualrents, and penalty due to him; no obligation upon him to account for the remaining ſums in the bond, which could not have been omitted, if a total aſſignation had been intended; and, as *Bogle* had a right in ſecurity, only to the extent of *L.* 2000, ſo Lord *Cranſton* ſtill retained a right in the *L.* 400 which was over.

A conveyance in ſecurity diveſts not the granter, it is no other than a pledge conſiſtent with the right of property which remains with him, *Stair*, *lib.* 2. *tit.* 10. §. 1. In a diſpoſition of this kind, an order of redemption is not neceſſary to re-inveſt the proprietor; and the diſponer in it has ſtill right to the ſuperplus of the ſubject conveyed above the debt ſecured.

An

An adjudication may perhaps diveſt a debtor of the whole ſubject, becauſe it adjudges the whole; but the diſpoſition in queſtion cannot, becauſe it conveys no more to *Bogle* than effeirs to the ſums due to him.

*Anſwered* to the *ſecond* objection: The reaſon of imputing payments *primo loco* to the extinction of the annualrents, is for the benefit of the original creditor, that he may not have his principal ſum extinguiſhed, which bears intereſt, and the bygone annualrents remaining as a dead ſtock; but this reaſon applies not to the preſent caſe; for the whole *L.* 820 of annualrents were accumulated into a principal ſum, at the entry of the purchaſer in the judicial ſale, who gave bond for the whole price of the eſtate to the creditors upon it.

Again, *pleaded* for the arreſters, in ſupport of the manner of imputing Lord *Caſſilis's* payment, which they contended for.

Where there is a catholic creditor having a double ſecurity upon different ſubjects, or upon different parts of the ſame ſubject, and ſecondary creditors having partial ſecurities thereon, the catholic creditor cannot make an arbitrary uſe of his catholic right, to the prejudice of any of the ſecondary creditors; but he is underſtood to draw proportionally, out of all the ſubjects over which his ſecurity ſtretches, ſo as the ſubſequent creditors may be ranked in the ſame manner as they would have been independent of it. Here then Lord *Caſſilis* having a ſecurity over two ſubjects, the principal ſum and the annualrents, muſt draw his debt proportionally out of both.

*Anſwered* for the diſponees: The fallacy of this argument lies in conſidering the principal ſum and annualrent as two different ſubjects; whereas Lord *Caſſilis* had but one ſecurity, to wit, the heritable bond itſelf, under which was comprehended the intereſts, which were no more than a part of it.

"The Lords, upon a report and hearing in preſence, found, That the "arreſtments were a habile diligence to affect the annualrents due "to Lord *Cranſton*, and that Lord *Caſſilis* muſt draw his payment "proportionally out of the capital ſum, and out of the annualrents "due to Lord *Cranſton*, and that the arreſters were preferable on the "annualrent after him."

But thereafter, on a reclaiming petition from the diſponees, and anſwers,

"The Lords preferred the diſponees to the ſuperplus of the debt, after "payment of Lord *Caſſilis*. And, on a reclaiming petition from the "arreſters and anſwers, adhered." J. D.

For the diſponees, *Lockhart*, &c. For the arreſters, *Ferguſon*, &c. Clerk, *Home*.

N° CLVIII.

N° CLVIII. 14th *July* 1755.

*JOHNSTON*, and *WILSON*, Assignees of *William Telfer*,

against

*NISBETS.*

*ARCHIBALD NISBET* of *Carphin* granted a bond of provision to his daughter *Eupham* for the sum of 3000 merks.

*Eupham Nisbet*, after the death of her father, married *William Telfer*, but without any contract of marriage.

Three months thereafter, in a post-nuptial contract of marriage, *William Telfer* bound himself to provide 9000 merks to his wife and the children of the marriage; and *Eupham Nisbet*, on her part, assigned to him, his heirs, *&c.* her portion of 3000 merks. In this contract, there was a clause dispensing with the legal return, in case the marriage should dissolve within year and day.

Within the year, *Eupham Nisbet* died without children.

*William Telfer* having assigned away the above bond, and the assignees having pursued the heir of *Carphin* for payment of it; the executors of *Eupham* brought a reduction of the contract of marriage, and of all that followed upon it, against the assignees.

The ground of reduction was, That *Eupham Nisbet* had been fraudulently induced by *Telfer*, at a time when he was insolvent, to marry him, and to convey her portion to him, in consideration of which, he pretended, on his part, to bind himself to provide the sum of 9000 merks to her and her children, when he had no such sum.

The proof came out, That, at the time of the contract, *William Telfer* was in very bad circumstances.

In support of the ground of this reduction, two late decisions were referred to; *Watson* against *Cameron*, in the year 1734; and *Ker* of *Abbotrule* against the creditors of *Elliot*, in the year 1741.

*Answered* for the assignees:

1*mo*, The utmost the law has gone, when the husband cannot perform the prestations contracted on his part, is to allow the wife retention of her tocher, for security of the provisions made to her; but here the wife being dead, has no need for the husband's part of the prestations in the contract.

2*do*, *Eupham*'s assignation was several months after the marriage. It may be wrong to induce a woman in an ante-nuptial contract to convey her fortune to a man, to whom, as yet, she has no tie; but there is no fault in inducing her to convey her fortune to one who is already her husband: on the contrary, that conveyance is what she owes in justice to him, and to his creditors.

In the cases of *Cameron* and *Ker* of *Abbotrule*, the wives were alive, and pleading retention, and the contracts of marriage, in which the wives tochers had been conveyed, were ante-nuptial.

" The Lords repelled the reasons of reduction."

The conception of *Eupham Nisbet*'s bond produced to the heir a separate defence against payment of 2000 merks of the 3000 merks.

One thousand merks of the bond was made payable to her, her heirs, executors, or assignees, six months after her father's death, and the remaining 2000

merks was payable to her, and the heirs to be procreate of her body, or her aſſignees, in any contract of marriage allenarly; and, that, upon expiry of year and day after her marriage, together with the annualrent of the ſaid whole ſum of 3000 merks, from the firſt term of *Whitſunday* or *Martinmaſs* after the deceaſe of *Archibald* the granter.

*Pleaded* for the heir: That the 2000 merks being only payable upon the expiry of year and day after *Eupham*'s marriage, and ſhe having died within that time, the ſum was not due.

*Anſwered* for the aſſignees: Old *Carphin*'s view in delaying the term of payment of the 2000 merks was to prevent the heir from being diſtreſſed upon any unexpected marriage of *Eupham*; for which reaſon, a year was given to him after her marriage to get the money ready; but it was far from his view to make the obligation of payment depend upon the contingency of her life: on the contrary, the ſum bears annualrent as well as the other 1000 merks, from the firſt term after his deceaſe, it is payable to the heirs of her body and certain aſſignees, and one of theſe laſt, her aſſignee in her contract of marriage, has long ſurvived the term ſtipulated for payment.

" The Lords found the whole ſums in the bond of proviſion due." J. D.

For aſſignees, *A. Pringle, J. Dalrymple.* For executors and heir, *Ferguſon, Lockhart, A. Hamilton.*

N° CLIX. 22d *July* 1755.

## *FRANCIS FARQUHARSON*
## againſt
## His MAJESTY's ADVOCATE.

*FRANCIS FARQUHARSON* having been clerk to a ſubmiſſion between Lord *Lovat* and *Fraſer* of *Phopachy*, in the year 1738, entered a claim upon the eſtate of *Lovat* for *L.* 100 *Sterling* to himſelf and *L.* 20 *Sterling* to his clerk, alledging that he had not been paid by Lord *Lovat*.

*Objected* for the Crown: That the claim was cut off by the triennial preſcription, unleſs proved by writ, or oath of party.

*Pleaded* for the Claimant: This debt does not fall under the ſtatute 1579; only accompts current, and debts contracted *de die in diem* are under the ſtatute, and may not be proved by witneſſes; becauſe of the danger of making up accompts, conſiſting of a variety of articles, from the memory of witneſſes; but a debt, ſuch as this, being a *honorarium* for a ſingle article of ſervice, neither falls under the words nor intendment of the law: action would have been good againſt Lord *Lovat* himſelf; for it was found, in the caſe of *Gabriel Napier*, That a clerk to a ſubmiſſion can purſue for his fee, tho' the arbiters cannot; action therefore will be likewiſe good againſt the Crown.

2*do*, This caſe falls under the exception of the ſtatute; the debt is *proved by writ*, *viz.* by the decreet-arbitral produced, which bears to be written by the claimant's clerk; and this is not only proof by writ of the claimant's having been employed, all that the law requires, but alſo of the performance of the work.

*Anſwered*

*Answered* for the Crown: The words of the act, "merchant-accompts, "and *other like debts*," are sufficiently extensive to comprehend this claim; by repeated decisions, writers and agents accompts have been found to be comprehended under this law. See 16th *December* 1675, *Somervell*; 29th *November* 1709, *Mason*. And the true reason of the act, which is, That no man is presumed to let his accompts lie over unpaid for three years after the date of the last article, applies with greater force to this accompt than to any other: debts of this kind do not enter into an accompt, they are commonly paid when the decreet-arbitral is pronounced, and no receipts or discharges are taken for such payment; the legal presumption therefore, is, That this *honorarium* was paid by Lord *Lovat*, and that presumption can only be taken away by writ, or oath of party.

*Answered* to the *second:* This case falls not under the exception of the act; for that no proof arises from the decreet-arbitral, that the work was performed by the claimant, it proves no more than that the decreet was wrote by such a person. Besides, the presumption of payment established by the act still remains; and the words, "proved by writ," means proved by writ of the debtor, not of any third party. W. S.

"The Lords dismissed the claim."

Act. *Burnet.* Alt. *Macqueen.* Clerk, *Kirkpatrick.*

N° CLX. 23d *July* 1755.

Sir *ANDREW MITCHELL*

against

*MARY GAINER.*

*MARY GAINER* being pursued upon a surgeon's account, for furnishings to her family at *London*, and the same being referred to her oath,

She, *inter alia*, deponed, "That she made no doubt, from the state of "*John Lietch* her servant his health, medicines might have been got for "him from the shop libelled, during the time libelled."

*Pleaded* for her: A master is not liable for medicines furnished to his servant in this manner.

"The Lords found, That the articles of the furnishings to *John Lietch* "the servant, are presumed to be furnished with the defender's con-"sent and knowledge; and therefore found her liable for the "same." J. D.

Act. *Wedderburn.* Alt. *J. Dalrymple.*

N° CLXI.

CLXI. 7th *Auguſt* 1755.

Major *THOMAS COCHRAN*, and others, Truſtees, appointed by the deceas'd *Charles Cochran* Eſq; of *Culroſs*,

againſt

Major General *JAMES COCHRAN.*

*CHARLES COCHRAN* of *Culroſs*, by a diſpoſition to take effect after his death, veſted his eſtate, heritable and moveable, in certain truſtees, for uſes; and, by the ſame deed, he gave the liferent of the houſe of *Culroſs*, and houſhold-furniture, gardens, and incloſures, to his brother Major General *James Cochran*, who, after the death of *Charles*, attained the poſſeſſion of theſe ſubjects.

The truſtees brought an action againſt the General, for having it found, *Firſt*, That he could only uſe the houſhold-furniture in the houſe of *Culroſs*. *2dly*, That ſome very fine table-linen, of *Dutch* damaſk, cut and ſhaped in 1663, but never ſewed, nor uſed, did not fall under the liferent-grant of houſhold-furniture; and, therefore, that the General ought inſtantly to reſtore them to the truſtees.

It was *pleaded* for the defender, againſt the *firſt* concluſion of the libel: That, as he had got right to the liferent of the furniture in the houſe of *Culroſs*, without any reſtriction as to the place where he was to uſe the furniture, he might uſe it where he pleaſed, and could be no further reſtrained than the nature of all liferents reſtrains the liferenter, *viz.* to the uſe *ſalva rei ſubſtantia*; and, altho' the furniture is in the deed deſcribed to be the furniture in the houſe of *Culroſs*, yet that was only demonſtrative of what furniture was given, but not taxative, ſo as to confine the defender to uſe the furniture only in the houſe of *Culroſs*. Liferent-rights of furniture are very common, and are often granted in favour of wives in their contracts of marriage, or by other deeds; and yet it was never pretended that the liferenters could only uſe that furniture in the houſe by which it happened to be deſcribed in the deed, and that they could not tranſport the bed and table-linen, or other furniture, to any houſe in town or country, where they might happen to reſide: were liferent-rights to be conſtructed as the purſuers would have them, they would often be of very little uſe to the liferenters.

Againſt the *ſecond* concluſion of the libel, it was *pleaded: Firſt*, That table-linen are undoubtedly houſhold-furniture, and therefore it was not neceſſary to inquire what was the proprietor's intention; ſuch inquiry is only neceſſary, when it is doubtful whether the thing falls under the deſcription of houſhold-furniture or not. *L.* 32. § 2. *D. De auro, argento, &c. legat. Argento, potorio, vel eſcario legato, in his quæ dubium eſt cujus generis ſint, conſuetudinem patriſfamilias ſpectandam; non etiam in his quæ certum eſt ejus generis non eſſe.* *2dly*, That the intention of the proprietor to make the damaſk houſhold-furniture, ſufficiently appeared from his cutting it into table-napkins, and table-cloaths; and therefore they fell under the liferent-grant of the furniture.

It was *anſwered* for the purſuers, in ſupport of the *firſt* concluſion of the libel: That, where the liferent of a houſe, and of the furniture in that houſe, is granted to one, it is implied in the grant, That the liferenter is only to uſe the furniture, when he reſides in that houſe; and, were it otherways,

otherways, the right of the fiar would be of very little value; for furniture is uſually adapted to the place where it is put up, but if moved from place to place, muſt very ſoon be deſtroyed.

In ſupport of the ſecond concluſion of the libel, it was *anſwered:* That it depends much upon the will of the proprietar, whether a thing is to be reckoned houſhold-furniture or not, as is obſerved by *Voet. ad tit. ff. de ſuppellect. legat.* N° 3. And as the table-linen were never uſed, nor ſo much as ſewed, ſo as to be fit for uſing, they cannot be conſidered as houſhold-furniture, as appears from the definition thereof in *L.* 7. § 1. *ff. de ſuppellect. legat. inſtrumentum quoddam patriæ familiæ rerum ad quotidianum uſum paratum.*

" The Lords found, That the Defender could not carry away any of the " houſhold-furniture out of the houſe of *Culroſs*, or uſe it any where " elſe but in that houſe; and found as to the linen cut, but not ſew- " ed, and which were kept for ſo many years backwards in the fa- " mily for a curioſity, without being made uſe of as furniture, that " the Defender had no right to uſe them any other way, than as they " had been formerly uſed." B.

Act. *And. Pringle,* Sir *John Stewart.* Alt. *Ro. Bruce.* Reporter, *Shewalton.* Clerk, *Gibſon.*

CLXII. 13th *November* 1755.

## The HERITORS of *INVERESK* againſt *JAMES MILNE.*

A Large tract of ground round the village of *Inveresk*, belonged to many proprietars, whoſe properties lay run-rig. *James Milne* was proprietar of part of the run-rig lands, and particularly of ſix acres lying together in an oblong form.

Some of the proprietars having brought an action of diviſion of theſe grounds, upon the act of King *William anent run-rig*, *James Milne* oppoſed the diviſion as to his ſix acres, which lay together, and *objected:* That the act was confined to the diviſion of grounds lying in alternate ridges; but could not be extended to ſeveral acres of ground lying together.

" The Lords repelled the objection, and ordered the diviſion to pro- " ceed." I. D.

Act. Sir *John Stuart.* Alt. *And. Pringle.*

CLXIII. 19th *November* 1755.

## *ANDREW CHALMER* of *Eaſter Dalrie* againſt *WILLIAM TYTLER* of *Woodhouſelie.*

*TYTLER* claimed to be enrolled as a freeholder of the county of *Edinburgh*, for the lands of *Foulfuird*, as being a forty ſhilling land of old extent.

In proof of which aſſertion he produced from the chancery an extract of a writing, which bears, That on the 3d day of *March*, 1554, an inquiſition was made before the Sheriff of *Edinburgh*, by certain perſons *qui jurati dicunt, quod terræ comitum dominorum et baronum et liberè tenentium vicecomitatus de* Edinburgh, *extendunt ad valorem ſubſcript. reſpectivè antiqui extentûs.* In this writing the lands of *Foulfuird* are valued at forty ſhillings. It concludes with theſe words, *In cujus rei teſtimonium*; but it does not bear, that the ſeals of the jurors were appended; neither does it make mention of the name of the Clerk, nor of his ſubſcription as Clerk.

The freeholders enrolled *Tytler* at the *Michaelmas* meeting 1755. *Chalmer* preferred a complaint againſt this enrolment, and *objected:* That the writing produced for *Tytler* could be conſidered only as the draught of a retour which had never been completed.

*Anſwered* for *Tytler:* Retours muſt be held to be authentic when regiſtrated by the proper officer of the law. This retour is not indeed recorded at length; but the ſame objection might be made to the authority of the record of many charters, wherein the names of the witneſſes are omitted, and inſtead of the teſting clauſe, theſe words are inſerted, *Teſtibus ut in præcedenti chartâ.* The ſame is the caſe in ſaſines: the law requires that they be inſerted at length in the record; but this has been frequently neglected in practice.

" The Lords repelled the objection." D.

Act. Sir *Da. Dalrymple.* Alt. *Rae, A. Pringle.* Clerk, *Kirkpatrick.*

CLXIV. 26th *November* 1755.

*CHRISTIAN SMITH* and *CHRISTIAN GRIERSON* her Infant-daughter,

againſt

*JAMES GRIERSON* Merchant in *Brechin.*

*CHRISTIAN SMITH* brought an action againſt *James Grierſon*, before the Commiſſaries of *Edinburgh*, for having it found and declared, That the purſuer *Chriſtian Smith* was his lawful wife, and that the other purſuer *Chriſtian Grierſon* was his lawful daughter,

The facts from which ſhe inferred theſe concluſions, and which ſhe offered to prove by witneſſes, were, That the defender made honourable addreſſes to her (who was every way his equal) for marriage; that the propoſals were communicated by him to her parents, and being agreed to, he viſited her very frequently at her father's houſe; that the ſervants in the houſe had over-heard him talking of the marriage to her father, and that the defender had communicated to ſome of his intimate friends his intentions of marrying the purſuer; had commiſſioned the purſuer's father to purchaſe ſome acres of land for him near the town of *Brechin*, and had purchaſed furniture, with the view of taking up houſe upon his marriage; that the purſuer and her friends had told ſeveral of their acquaintance of the intended marriage, and that the purſuer had beſpoke one of her acquaintance, who was a mantua-maker, to make her marriage-gown; and that it was commonly reported, and believed in the town

town of *Brechin*, that the purſuer and defender were ſoon to be married together; that when matters were thus going on, the defender one day enticed the purſuer to come to his room, where he prevailed upon her to yield to his embraces, ſaying to her, that they were already huſband and wife in the ſight of God, having plighted their faith to each other, and promiſing he would immediately proceed to celebrate the marriage publickly; that the other purſuer, *Chriſtian Grierſon*, was the fruit of this intercourſe; that the defender had acknowledged her to be his daughter before the kirk-ſeſſion of *Brechin*; and when interrogate by the ſeſſion, if he promiſed the purſuer marriage when he had her in his room, he ſaid he did not remember; and being interrogate if he had at any other time promiſed to marry her, he declined to anſwer the queſtion.

The defender denied that he had ever given the purſuer any promiſe of marriage; and contended, That a promiſe of marriage, when founded on to infer a marriage by a ſubſequent *copula*, could only be proved *ſcripto vel juramento*.

The Commiſſaries "found the *copula* between the purſuer and the defender relevant to be proved *prout de jure*; and found the previous promiſe of marriage by the defender to the purſuer relevant to be proven by his writ or oath only, without prejudice to the purſuer to inſiſt for a proof *prout de jure* of the facts libelled, in order to infer damages, as accords."

After the above interlocutor was pronounced, the purſuer, *Chriſtian Smith*, brought another action againſt the defender, ſetting forth, That if ſhe ſhould not be able to make out the facts libelled relevant to be proven *prout de jure*, to infer an agreement, or promiſe by the defender to marry her previous to the *copula*, yet that the facts were relevant to infer damages, *&c.* and therefore, if ſhe failed in bringing a proof relevant to infer the concluſions of marriage and legitimacy, that the defender, in reſpect of the premiſes, ought to be decerned to pay to the purſuer a ſum in name of damages, and for the aliment of the child. Together with this ſummons ſhe gave in to the Commiſſaries a petition reclaiming againſt their former interlocutor, and praying, that they would conjoin the two proceſſes; and before anſwer admit the facts contained in the two libels to be proved *prout de jure*, reſerving to themſelves to determine, after the proof ſhould be brought, whether it was relevant to infer the concluſions of marriage and legitimacy, or only the alternate concluſion of damages. The Commiſſaries refuſed the petition, and adhered to their former interlocutor.

The purſuer applied to the Court of Seſſion by a bill of advocation, and pleaded, That the facts ſet forth in her libel were ſufficient to ſhow, that there was a promiſe or agreement of marriage betwixt the defender and her, and were much ſtronger than mere verbal promiſes, which are often made by men *in æſtu libidinis*, without any deſign of performing them, and are not much relied on by the other ſex: and yet even ſuch promiſes as theſe, with a ſubſequent *copula*, would by the law of *Scotland* be ſufficient to conſtitute a marriage, and much more ought a marriage to be conſtituted by the defender's promiſe, or agreement to marry the purſuer, manifeſted ſo ſtrongly and deliberately *rebus ipſis et factis*, and on which the purſuer thought ſhe had the greateſt ground to rely; and that theſe facts were undoubtedly probable by witneſſes, as falling under their obſervation,

vation, altho' a mere verbal promiſe being only *nuda emiſſio verborum*, and which witneſſes might miſtake, may not be ſo proved.

*Anſwered* for the defender: That a propoſal, or purpoſe of marriage, is not ſufficient to conſtitute a marriage, tho' a *copula* follow; for one may propoſe a thing, and afterwards repent of it, in which caſe he will not be bound by ſuch propoſal: and therefore it was neceſſary for the purſuer to alledge and prove an actual promiſe, and ſuch promiſe could neither directly nor indirectly be proved any way but by the writ or oath of the defender: for it is an eſtabliſhed principle, that no promiſes can be proved by witneſſes; and if this hold with reſpect to promiſes in general, it muſt much more do ſo with reſpect to promiſes of marriage, as being of the greateſt conſequence; and ſhould witneſſes be admitted to prove ſuch promiſes, either directly or indirectly, it would be of the moſt dangerous conſequence, as the relations and friends of young women, who had yielded up their virtue, would be under ſtrong temptations to ſwear to ſuch propoſals or promiſes, in order to cover the ſhame of their relations, and to procure advantageous marriages for them.

The Lords were of opinion, that the facts offered to be proved inferred a promiſe or agreement of marriage, and that a proof of them by witneſſes was competent: and therefore

"They remitted the cauſe to the Commiſſaries, with an inſtruction to "allow the purſuer a proof of the facts before anſwer." B.

Act. *Advocatus & Lockhart.* Alt. *Ferguſon, Andrew Pringle & Elliot.* Reporter, *Preſtongrange.*

N° CLXV. 26th *November* 1755.

Mr. *DAVID FORBES* Miniſter of the Goſpel at *Borge*,

againſt

*JOHN MILLER* Factor upon the ſequeſtrate Eſtate of *Carletoun.*

THE preſent pariſh of *Borge* conſiſts of what was antiently three pariſhes, *viz. Borge*, *Senwick* and *Kirkanders*: the miniſter was in poſſeſſion of the three gleibs, which had antiently belonged to theſe pariſhes, each of which gleibs were below the legal appointed by act of Parliament, but when taken together were above it, and were beſides ſufficient for graſing a horſe and two cows.

When Mr. *Forbes* was admitted to be miniſter at *Borge*, in *March* 1752, the Preſbytery of *Kirkcudbright* inquired if there was a legal gleib at *Borge*, and if the miniſter was provided with graſs for a horſe and two cows, as is appointed by the 21ſt act, Parliament 1663, and finding that the gleib at *Borge* was below the legal ſtandard, and that there never had been any deſignation of graſs made, the Preſbytery proceeded, according to the uſual form, to make an addition of arable ground to the old gleib, and to make a deſignation of graſs for one horſe and two cows, out of church-lands lying contiguous to the old gleib.

As the lands deſigned for an addition to the gleib and for graſs, were part of the eſtate of *Carletoun*, *John Miller*, who had been appointed factor thereon by the Court of Seſſion, obtained ſuſpenſion of the Preſbytery's decreet, and *pleaded*, That as the arable land in all the three gleibs,

gleibs, when taken together, exceeded a legal gleib, and that the miniſter had in theſe gleibs ſufficient paſturage for a horſe and two cows, he was not intitled to any addition, either for arable land or for paſturage.

*Anſwered* for the charger: That by the 48th act of Parliament 1572, and 116th act, Parliament 1592, miniſters are intitled to four acres and a half at leaſt, out of the church-lands which lie neareſt to the manſe; and the annexing of the pariſhes of *Kirkanders* and *Senwick* to the pariſh of *Borge*, could not deprive the miniſter of his right of having a legal gleib contiguous to his manſe at *Borge*; for theſe annexations were intended for the benefit of the clergy, and ought not to be turned to their prejudice. Agreeable to this the court decided 22d *January* 1631, *Rough contra Keir*, where the miniſter of the united pariſhes of *Inverkeithing* and *Roſyth* got a gleib deſigned to him at *Inverkeithing*, altho' he had one at *Roſyth*; and lately in the caſe of the miniſter of *Kelton*, the Lords found him intitled to an addition to his gleib at *Kelton*, altho' he had two other gleibs belonging to two pariſhes which had been united to *Kelton*. That when lands lie at a diſtance from the manſe, and in the preſent caſe the gleibs of *Kirkanders* and *Senwick* lie two miles from it, they cannot ſerve for the purpoſes of a gleib, and are worth no more than the rent they will yield when ſet, as the miniſter cannot labour them himſelf, ſo may be conſidered as additions to the benefice, but none to the gleib: and ſo ſenſible was the legiſlature that the gleib ought to be contiguous to the manſe, that by the 7th act, Parliament 1606, it is ſtatute, That where there are no arable lands adjacent to the manſe, there ſhall be deſigned four ſoums of graſs for ilk acre, of the beſt paſturage of any kirk-lands lying neareſt to the ſaid kirks.

That with reſpect to the deſignation for graſs, the caſe was ſtill clearer; for of whatever extent the gleib be, the miniſter, by act 1663, is intitled to have graſs for a horſe and two cows over and above the gleib: agreeable to which the Lords decided in favour of the miniſter of *Croy contra Dallas*, *January* 1734, and if there be no church-lands out of which he can get the graſs, the act appoints that he ſhall have *L.* 20 *Scots* yearly in lieu thereof. That it was certain, there never had been any deſignation of graſs in any of the pariſhes, for none of the gleibs amounted to the legal ſtandard of a gleib, ſo could not comprehend the graſs to which the miniſter was intitled; and the three pariſhes were united before the act 1663, at the date of which act the miniſter was in poſſeſſion of all the three ſmall gleibs he now poſſeſſes; and that as theſe two ſmall gleibs, which lie at two miles diſtance from the manſe, could no more exclude the miniſter from his right to graſs than a large ſtipend could, ſo neither could they ſerve the purpoſes of graſs, as he could have no benefit from his horſe and cows if they were at two miles diſtance from him.

*Replied* for the ſuſpender: That all the proviſions to which miniſters are by law intitled, are a legal ſtipend, a manſe, a gleib, conſiſting of four acres of arable land, and graſs for a horſe and two cows; if the miniſter has theſe, no matter how they were originally conſtituted, that is, whether they belonged to an original pariſh, or if they were made up of the ſtipends and gleibs of two or more united pariſhes: That the charger might as well inſiſt to have a legal gleib in each of the three pariſhes, or indeed to have three legal ſtipends, as to have the addition he now contends for; but as it was ſufficient that the three ſtipends, when added

 together,

together, made up a legal one, ſo it was ſufficient, that when the three gleibs were added together, they made up a legal gleib, and alſo furniſhed the miniſter with paſture ſufficient for his horſe and two cows: That in many pariſhes the gleib lies at a diſtance from the manſe, and ſometimes lies in different places; for the law only directs, that where a miniſter is to get lands deſigned for a gleib, there ſhall be deſigned out of the lands mentioned in the acts of Parliament four acres at leaſt, lying neareſt to the manſe, but where there are no church-lands near to the manſe, the miniſter muſt put up with the inconveniency of having his gleib at a diſtance.

That as the charger has ground ſufficient both for the purpoſes of a gleib and of graſs-grounds, it is preſumed, that the ground has been given for both theſe purpoſes, eſpecially as there are above three acres of paſture-grounds in the gleib of *Senwick*, and two acres and one half in the gleib of *Borge*. There are no records kept of the deſignations of graſs, all the land given to miniſters commonly paſs under the name of the gleib, and often the graſs-grounds are ploughed up, and turned into arable land; and therefore, unleſs it be preſumed, that where a miniſter has ground ſufficient for both purpoſes, the ground has been given for both, it might often happen, that miniſters might get graſs again and again deſigned for paſture in the ſame pariſh at the diſtance of ſome years.

"The Lords found, That the charger being in poſſeſſion of three gleibs, "extending to more than a legal gleib for arable ground and graſs, "was not intitled to an additional deſignation to theſe gleibs; and "therefore ſuſpended the letters *ſimpliciter*." B.

Act. *And. Pringle, Dav. Dalrymple & Bruce.* Alt. *Lockhart.* Clerk, *Home.*

N° CLXVI. 28th *November* 1755.

*JOHN GRANT* Tackſman of the mill of *Ruthven*,

againſt

*JAMES MILNE* of *Bottarie*.

*JAMES MILNE* was aſtricted by his tack to the mill of *Ruthven*, and bound to pay certain multures for all corn, either produced from his farm, or brought in for the uſe of his family.

The repreſentative of *Milne* being purſued for abſtracted multures, *objected:* That *Milne* had, during his poſſeſſion, kept his whole grounds in graſs; that neither he nor any of his family had reſided on the farm, and, conſequently, that no multure could, in terms of his tack, be due.

The Lord Ordinary "aſſoilzied the defender," and the Lords adhered, altho' it was *pleaded* for the tackſman of the mill, That multures, when aſcertained by cuſtom, and known to the tenant, of lands ſubjected to thirlage, are to be conſidered as part of the rent; that a tenant is, from the nature of his tack, ſuppoſed to reſide on the lands let to him; and conſequently, that ſuch tenant may not diminiſh this rent, or elude the purpoſes of his tack, either by converting the whole of his corn-grounds into graſs-grounds, or by reſiding elſewhere than on the lands let to him. D.

Petitioner *Miller.*

N° CLXVII.

N° CLXVII. 28th *November* 1755.

*GEORGE OUGHTERLONY* of *London*, Merchant,

againſt

The Earl of *SELKIRK*.

SIR *Alexander Murray* of *Stenhope* obtained a charter of mines from the Crown; it recited the 12th unprinted act, Parl. 12. *Ja.* VI. 1592, and granted to Sir *Alexander* his heirs and aſſignies, all the mines found or to be found in his lands, in the county of *Peebles*.

After the date of this charter, the creditors of Sir *Alexander* did diligence againſt his eſtate. The Earl of *Selkirk* adjudged the lands, *Oughterlony* adjudged both lands and mines.

In a competition of the creditors of *Stenhope*, the queſtion occurred, Whether the mines were carried by the adjudication which mentioned the lands only.

*Pleaded* for *Oughterlony*, who adjudged both the lands and the mines: He who has right to lands, may, in terms of the act 1592, demand a charter of mines. This faculty of demanding will be carried by an adjudication of lands: but after this faculty has been exerciſed, and a charter of mines obtained, the lands and the mines are held under different titles, and muſt be ſeparately adjudged. Thus an adjudication of lands may carry the right which the proprietor has of purchaſing the teinds of thoſe lands; but ſuch adjudication will not carry the teinds already belonging to the proprietor of the lands.

*Pleaded* for the Earl of *Selkirk*, who adjudged the lands only by the act 1592: The proprietor of lands may demand a charter of mines, and he alone may work them; he cannot work them after the lands have been adjudged from him, unleſs therefore the adjudication of lands carry the mines, the grant of the mines muſt become ineffectual, and the intention of the act 1592 be fruſtrated.

"The Lords found, That the adjudication of the lands comprehends "the mines." D.

For *Oughterlony*, Sir *D. Dalrymple*, *Lockhart*. Alt. *Miller*, *Brown*. Reporter, *Strichen*. Clerk, *Juſtice*.

N° CLXVIII. 30th *November* 1755.

*ELISABETH M'KENZIE*

againſt

*M'KENZIE* of *Blackhill*.

*MARTIN* and *M'Kenzie* of *Blackhill* granted bond, conjunctly and ſeverally, to *Urquhart*; on this bond diligence was raiſed, and a caption taken out againſt both the obligants. Sir *George M'Kenzie* became bound with them, conjunctly and ſeverally, in a bond of corroboration, which bond proceeds on the recital of the former one, and of the diligence done upon it.

Sir

Sir *George M'Kenzie* paid the debt, and took an aſſignation to the original bond of corroboration and diligence. *Eliſabeth M'Kenzie* his executrix purſued *Blackhill* for a total relief.

*Blackhill* produced a bond of relief granted to him by *Martin*, from which it appeared, that he had been cautioner only to *Martin* in the firſt bond; and he *pleaded*, That Sir *George* and he were co-cautioners, and that cautioners are liable to each other in a proportional, not total relief: That it matters not whether all the cautioners become bound in the ſame, or in ſeparate deeds; and ſo it was found 15th *December* 1722, *Murray* againſt the creditors of *Orchardtown*.

*Anſwered* for the purſuer: A cautioner muſt be intitled to a total relief from all thoſe for whoſe benefit he interpoſed: in this caſe caption had been taken out againſt both *Blackhill* and *Martin*; Sir *George* joined with both in the bond of corroboration, and from that bond it does not appear who was the principal debtor. It muſt therefore be preſumed, that Sir *George* interpoſed at the deſire of both *Martin* and *Blackhill*, and had both of them in view for his relief. When a new cautioner grants ſingly a bond of corroboration, he is intitled to a total relief from the former cautioners, 1ſt *December* 1703, *Clarkſon* againſt *Edgar*; and the equity here is ſtill more apparent. The caſe is different where the principal alone becomes bound with a new cautioner; for that the preſumption then is, that the new cautioner relied on the principal alone for a total relief, and to this the deciſion of *Murray* againſt the creditors of *Orchardtown* relates.

"The Lords found relief competent to *Eliſabeth M'Kenzie, in ſolidum*, "againſt both the obligants in the original bond." D.

Act. *Fraſer.* Alt. *Hamilton-Gordon.* Reporter, *Milton.*

N° CLXIX. 5th *December* 1755.

Sir *THOMAS HAY* of *Alderſton*

againſt

*JAMES KILGOUR.*

SIR *John Hay* died in the 1706, leaving his eldeſt ſon and heir Sir *Thomas*, then an infant, under the tuition of his mother and two uncles.

A few months after the death of Sir *John*, theſe tutors entered into a feu-contract with *James Kilgour*, wherein, upon the narrative, that Sir *John* intended to have executed this contract had not death prevented, "they ſold to *Kilgour*, his heirs and aſſignies, certain lands for the ſum of "2500 merks. *Proviſo*, That Sir *Thomas* may redeem at any time before "his age of 25, upon payment of that ſum. And the tutors bind and oblige them, their heirs and ſucceſſors, to move and cauſe their ſaid pupil, "and his foreſaids, at his attaining the age of 25 years complete, either "to ratify this preſent contract in favour of *Kilgour*, or to repay to him "the ſaid ſum of 2500 merks."

Of this feu-contract Sir *Thomas*, in the 1750, brought a reduction upon this ground, That the ſame was void and null, as being granted by his

his tutors without the authority of a judge; and tho' he, Sir *Thomas*, did not redeem before his attaining the age of 25 years, yet, as the tutors had no power to grant this right, they could not limit him in his power of redeeming the lands *quocunque tempore*, and inſiſted ſtill to be allowed to redeem.

*Anſwered* for *Kilgour*: Sir *Thomas* is not only forecloſed by not redeeming within the *quadriennium utile*, but he has by repeated acts of homologation ratified the deed in queſtion, ſo as to bar his power of redemption, 1*mo*, By his having ſtated and cleared accompts with his tutors after his majority, wherein this tranſaction with *Kilgour* is ſtated as an article and allowed. See the caſe *Crawfurd* againſt *Crawfurd*, *January* 1683, obſerved in the *Dictionary*, *vol.* i. *f.* 381. And tho' it is named in the accompts a *redeemable ſecurity made by the tutors to Kilgour*, yet it is moſt properly ſo deſcribed on account of the power of redemption reſerved in it to Sir *Thomas*.

2*do*, In the diſcharge granted to his tutors, in conſequence of this clearance, reciting their having delivered up to him all his writs and evidents, he, by a particular clauſe, "ratifies and approves all diſcharges and *con-*" *veyances* made and granted by them during the time of their adminiſtra-" tion, to whatever perſons, as fully as if the ſame had been therein parti-" cularly expreſſed." And as he, *Kilgour*, unqueſtionably has recourſe againſt the tutors upon the feu-contract, and their obligement therein, ſo the tutors have recourſe againſt Sir *Thomas* upon this diſcharge and ratification.

3*tio*, Sir *Thomas*, ſo far from taking advantage of the clauſe leaving him at liberty to reſile at any time before his age of 25, has continued for upwards of 30 years, to receive the feu-duty payable by *Kilgour*, and to diſcharge it expreſsly under that name.

*Replied* for Sir *Thomas*: The acts of homologation alledged by *Kilgour*, are not ſufficient to bar this redemption. Homologation is never to be preſumed where the act is capable of a different conſtruction, nor unleſs it do clearly appear, that the party was in the full knowledge of the nature and quality of the right which he is ſuppoſed to have homologated. The tutorial accompts mentions this right granted to *Kilgour*, as a *redeemable ſecurity* for re-payment of 2500 merks. Sir *Thomas* underſtood it, as the words plainly import, to be a wadſet, and as ſuch approved of it; but from thence it cannot be inferred, that he had any knowledge of this being an abſolute ſale of part of his eſtate under a limited power of redemption, and as ſuch ever purpoſed to homologate it. The ſame anſwer is made to the other act of redemption, *viz.* the receipts of the feu-duty. A ſmall feu-duty was altogether conſiſtent with the right, whether containing a limited or unlimited power of redemption: and acceptance of this feu-duty can never import a knowledge that the faculty of redemption was limited to the age of 25, or preſume a conſent that *Kilgour* ſhould hold the lands as an abſolute right of property. With reſpect to the diſcharge granted to his tutors, it appears from a proceſs of exhibition, which was intented in the year 1749, againſt *Thomas Hay* one of the tutors, that the whole of Sir *Thomas*'s writings ſtill remained in the hands of the tutors till they were produced in that proceſs, and then, and no ſooner, Sir *Thomas* came to the knowledge of the nature of the right granted to *Kilgour*; and as the approbation of the tutorial accompts muſt be explained *quoad* this article agreeably to the nature of the deed, as ſtated

in theſe accompts, ſo alſo muſt the general diſcharge and ratification granted upon the accompts ſo ſtated.

" The Lords found the lands not redeemable." W. S.

Act. *Lockhart.* Alt. *George Cockburne.* Clerk, *Juſtice.*

N° CLXX. 12th *December* 1755.

*HENRIETTA* Ducheſs Dowager of *Gordon*,

againſt

His Majeſty's ADVOCATE.

LORD *Lewis Gordon* having been attainted of high treaſon, by ſtatute 19th of the King, and his eſtates ſurveyed, the Ducheſs of *Gordon* his mother entered a claim for *L.* 1433 *Sterling*; of this ſum *L.* 1345 *Sterling* had been advanced by the Claimant in payment of bills drawn by Lord *Lewis*, from the 7th of *January* 1740, to the 8th of *June* 1745, upon merchants with whom the Ducheſs had given him credit. And the remaining *L.* 87 was made up of accompts of furniſhings which ſhe had likewiſe paid for him.

*Objected* for the Crown: 1*mo*, The bills were all drawn by the late Lord *Lewis* when a minor, and the Ducheſs his curatrix ought not to have advanced more for his annual expence than the yearly intereſt of his fortune, which did not exceed *L.* 1000 *Sterling* capital; ſo was found 17th *November* 1680, *Sandilands* againſt *Telfer*; which judgment ought to be followed *à fortiori* in the preſent caſe; for that during a great part of the time in which theſe bills were drawn, Lord *Lewis* enjoyed a lucrative employment in his Majeſty's ſervice, being a Lieutenant on board a ſhip of war.

2*do*, As theſe advances made by the Ducheſs exceed the total amount of her ſon's patrimony, it cannot be imagined ſhe intended that a debt was thereby to be created againſt him, to reduce him to bankruptcy, or that ſhe had any view to repetition from him of a ſum greater than all he had in the world; more eſpecially, as ſhe took no obligation from him to repay theſe ſums, it muſt be preſumed that they were advanced by her *ex materna pietate & animo donandi.* And further, as his Majeſty, in the year 1735, granted to the Ducheſs a penſion of *L.* 1000 *Sterling per annum for the better ſupport of herſelf and children*, which penſion ſhe enjoyed during the whole period that the advances in queſtion were made, theſe ſums will be preſumed to have been advanced out of that fund.

3*tio*, The accompts muſt likewiſe be preſumed paid with her ſon's money, or by way of donation, as they were paid upon receipts without taking aſſignations; and ſome of the furniſhings were poſterior to the 24th *June* 1745, and ſo could not affect the forfeited perſon's eſtate, which from that period was veſted by ſtatute in the Crown.

*Anſwered* for the Claimant to the firſt: Lord *Lewis*, by reaſon of the ſudden death of the Duke his father, had no patrimony left him: a legacy of *L.* 500 bequeathed to him by his grandmother, and his tenth ſhare of his father's executry, amounting nearly to as much more, were his

his only funds; theſe in no view could be conſidered as a patrimony. The ſums themſelves were inſufficient to carry on his education in a manner ſuitable to his birth. His choice led him to enter into the navy, and as he could receive no pay until the ſhip was cleared off, which did not happen before his attainder, it was both proper and neceſſary to advance ſuch a ſum as would enable the ſon of a noble family to appear ſuitably to his birth. The ſums advanced by the Ducheſs do little exceed *L.* 200 a year; a ſum nowiſe extravagant. The law ſurely cannot be ſo unreaſonable as to confine him to the intereſt of ſums evidently inſufficient to ſupport him like other gentlemen in the ſervice, tho' not of equal birth. It is allowed that a curator may encroach upon the minor's ſtock for payment of an apprentice-fee, or ſetting him out in the way of trade. The caſe here is truly the ſame, and tho' it has been found in one caſe, that a tutor ought not to expend more upon the aliment of his pupil than the yearly annualrent of his patrimony, yet this was never found in the caſe of a curator, nor does the ſame reaſon hold equally in both caſes. The expence of an infant is inconſiderable; that of a minor muſt be greater. The minor, now advanced in judgment, makes choice of the employment he is to follow, and concurs with his curator in judging a larger ſum neceſſary to fit him out for that employment. It would be unbecoming in a minor to challenge ſuch ſum, honeſtly laid out by the curator at his deſire; and there is no inſtance where ſuch objection ever was ſuſtained.

To the ſecond objection *anſwered:* There is no foundation for the *praeſumptio donandi.* When a curator gives credit to the minor on his going abroad, and anſwers the bills he draws from time to time for his ſubſiſtence, it has never been doubted, that ſuch payments made upon the minor's draughts behoved to be admitted as good articles in the curator's accompts; and as this claim would have been good againſt Lord *Lewis*, it will be ſo againſt the Crown. Written documents were taken from him by the merchants, at the advance of the money, and theſe were preſerved and delivered to the Ducheſs, and are now produced and founded upon. With regard to the penſion, the Ducheſs can ſhow, that ſhe had beſtowed upon Lord *Lewis* his full ſhare of it, abſtracting from the bills, which make the ſubject of this claim, as ſhe laid out the expence of his aliment and education, from his father's death until he came to be 15 years of age. At any rate ſhe did not become debtor in the penſion to her children; and as ſhe had the power of diſtribution, ſhe might give to Lord *Lewis* or not, as ſhe pleaſed.

With reſpect to the third: It is not uſual for curators, paying accompts due by minors, to take conveyances from the creditors. A third party paying accompts due by another upon receipt, is intitled to repetition. And tho' it is true, that ſome of the articles were furniſhed after the 24th *June* 1745, yet they were all furniſhed *bona fide* before he had any acceſſion to the rebellion, and therefore were all equally juſt debts.

"The Lords ſuſtained the claim to the extent of the bills claimed on, "amounting to the ſum of *L.* 1345 : 6 : 10 *Sterling*." W. S.

Act. *Ferguſon.* Alt. *M'Queen* & King's Council. Reporter, *Strichen.* Clerk, *Kirkpatrick.*

CLXXI.

N° CLXXI. 12th *December* 1755.

*GEORGE DURY* and *DAVID BLACK*

againſt

Mr. *THOMSON* Miniſter at *Dumfermling*.

THE Miniſter of *Dumfermling* applied to the Preſbytery for the *L.* 20 given by the act 1663, *c.* 11. where no deſignation of graſs can take place.

The Preſbytery ordained the heritors of the kirk-lands lying *next eweſt* to the kirk and manſe to pay the *L.* 20.

The Heritors ſuſpended, and inſiſted, that the ſtatute lays this burden upon the whole heritors of the pariſh, they having relief from the heritors of kirk-lands; and that ſo was found in the caſe of *Kilwinning*, *January* 3. 1745.

*Anſwered* for the Miniſter: The ſtatute ſurrogates the *L.* 20 in place of the graſs; and from the words of it the ſame perſons are liable in both, and in the ſame manner. In the caſe of *Kilwinning* there were none but kirk-lands within the pariſh.

" The Lords found, That the *L.* 20 is payable out of the kirk-lands of " the pariſh of *Dumfermling*, and that the neareſt heritor of the ſaid " kirk-lands is immediately liable in payment to the Miniſter, reſer- " ving relief to the ſaid heritor from the other heritors of kirk- " lands." W. S.

Charger, *M^c Intoſh*. Suſpender, *Ferguſon*. Clerk, *Forbes*.

N° CLXXII. 17th *December* 1755.

CREDITORS on the forfeited Eſtate of *Strowan*

againſt

His Majeſty's ADVOCATE.

IN the 1689 *Alexander Robertſon* of *Strowan* engaged in rebellion, and in the 1690 was, by a ſentence of the Parliament of *Scotland*, convicted and forfeited in abſence.

In the year 1703 Queen *Anne* granted him a pardon, together with a gift of his eſtate, and of all the rents and debts which he had forfeited: the remiſſion and gift were taken out at the Secretary's office, but never paſſed the ſeals.

*Strowan*, in conſequence of this incomplete pardon, lived in the open and undiſturbed poſſeſſion of the eſtate which had belonged to him, was admitted to ſue and to defend before the Court of Seſſion, and the Houſe of Peers; and *that*, altho' the objection that he had no *perſona ſtandi* was moved.

During the period from the 1703 to the 1715, he contracted various debts. In the 1715 *Strowan* again entered into rebellion, and was attainted by act of Parliament, notwithſtanding of his former forfeiture.

In

In the 1723 King *George* I. made a gift of the eſtate of *Strowan* to *Margaret Robertſon*, ſiſter of *Strowan*, which gift was declared revocable at pleaſure: ſhe conveyed it to truſtees redeemable by *Strowan* for 1000 merks, whenever he ſhould be pardoned.

In the 1732 *Strowan* obtained a pardon, which paſſed the ſeals. He returned to the poſſeſſion of his eſtate, but uſed no order of redemption againſt the truſtees. He contracted new debts: in the 1740 the eſtate which had belonged to him, was, at the ſuit of his creditors, ſequeſtrated by the Court of Seſſion.

Between the 1703 and the 1715, *Strowan* alſo acquired right, in the name of a truſtee, to certain adjudications againſt this eſtate. The truſtee conveyed them to an aſſignee, who in the 1717 obtained a decree of the Court of Seſſion againſt the truſtee, and afterwards conveyed them in truſt for the behoof of *Strowan*.

*Strowan* having, in the 1745, engaged again in rebellion, the grant in favour of *Margaret Robertſon* was revoked by his Majeſty: the eſtate which belonged to the King by the forfeiture in the 1690, was, by act of Parliament paſſed in the 1752, annexed to the Crown; but an act paſſed in the 1753, allowed all creditors having any lawful claims on this eſtate, to enter them within a time limited, and ordained ſuch claims to be judged of in the ſame manner as the claims affecting the other eſtates forfeited by the rebellion of the proprietors in the 1745.

They who had become creditors to *Strowan* during the two periods above mentioned, *viz.* from the 1703 to the 1715, and from the 1732 to the 1745, entered their claims.

It was *objected* for his Majeſty's Advocate: That the whole eſtates of *Strowan* were forfeited by act of Parliament in the 1690; that the remiſſion and gift granted to *Strowan* in the 1703, could not prevent the effect of this forfeiture, for that they, having never paſſed the ſeals, were revocable by Queen *Anne*, and by her demiſe became of no avail againſt the ſucceeding Prince.

*Pleaded* for the Creditors: 1*mo*, Altho' the pardon was revocable by Queen *Anne*, and fell by her demiſe, yet this ought not to affect the creditors who had contracted *bona fide* with *Strowan*, while he remained in poſſeſſion of the eſtate, and acted in all reſpects as if no ſentence of forfeiture had paſſed: the Crown could have no action againſt the tenants of the eſtate for rent paid to *Strowan*, nor againſt his debtors for debts contracted before the forfeiture, and paid to him after his pardon: any perſon who had purchaſed the woods on the eſtate from *Strowan*, might, notwithſtanding the lapſe of the pardon, demand delivery; and the ſame equity may be urged in ſupport of the claim made by the creditors who contracted with *Strowan* in the courſe of daily tranſactions: this *bona fides* ought more particularly to be ſupported in the caſe of forfeitures, where creditors are *in damno vitando*, but the Crown is *in acquirendo* by the delict of the debtor.

2*do*, The Claimants have alſo a valid title to the adjudications purchaſed by *Strowan*, who was enabled to purchaſe them by the money which they lent him. *Strowan* was, by the pardon granted by Queen *Anne*, rendered capable of holding the adjudications at the time of the purchaſe; had he at that time aſſigned them, his aſſignee would have been preferred to the Crown; ſo alſo ought the creditors, who lent their money *bona fide* to him.

3*tio*, The claim of the ſecond claſs of Creditors ought to be ſuſtained, for that they were reaſonably induced to truſt *Strowan* at a time during which adjudications were allowed to paſs againſt the eſtate, as belonging to *Strowan*.

*Pleaded* for his Majeſty's Advocate: 1*mo*, No pretence of *bona fides* can be urged in this caſe; for that the Creditors are preſumed to have known of the forfeiture, and if they knew of the gift and remiſſion, they muſt alſo have known that they were incompleat. But further, altho' *bona fides* might afford a defence in an action of repetition at the inſtance of the Crown againſt him who had paid rent or money to *Strowan*, yet *bona fides* cannot be the foundation of an active title in the Claimants, againſt an eſtate which did not belong to *Strowan* their debtor.

2*do*, The adjudications became the property of the Crown upon their being acquired by *Strowan*, at leaſt the Crown acquired right to every thing belonging to *Strowan*, as ſoon as by the demiſe of Queen *Anne* his pardon fell. The Creditors ought to have known this; and if they lent their money for the purchaſe of the adjudications, they muſt be preſumed to have lent it on this hazard, and on the perſonal ſecurity of *Strowan*.

3*tio*, The ſecond claſs of Creditors muſt alſo be preſumed to have known that the grant to *Margaret Robertſon* was revocable at pleaſure by his Majeſty.

" The Lords found, That the eſtate of *Strowan* having been forfeited by " a decree of the Parliament of *Scotland*, in the year 1690, the Cre- " ditors, contractors with *Alexander Robertſon* of *Strowan* poſterior " thereto, have no claim in law upon the ſaid eſtate." D.

Act. *Wedderburn, J. Craigie, Ferguſon.* Alt. *King's Council.* Reporter, *Milton.* Clerk, *Home.*

*N. B.* The Claimants repreſented, That ſome equitable relief might poſſibly be obtained for them: at their deſire, " The Lords remitted " to the Lord Ordinary to aſcertain the extent of their ſeveral claims, " agreeable to the vouchers and documents produced."

N° CLXXIII. 7th *January* 1756.

*JOHN WILSON* Collector of his Majeſty's Cuſtoms at *Stockton*, in the County of *Durham*,

againſt

*ROBERT BRUNTON* and *JAMES CHALMERS* Merchants in *Edinburgh*.

BY an act of the 12th of Queen *Anne*, *cap.* 18. made perpetual 4th *Geo.* I. *cap.* 12. it is enacted, " That the Collector of the cuſtoms, or any o- " ther perſon who ſhall be employed in preſerving any veſſel in diſtreſs, " ſhall, within 30 days after the ſervice performed, be paid a reaſonable " reward for the ſame; and in default thereof, the ſhip or goods ſo ſa- " ved ſhall remain in the cuſtody of the Collector, till ſuch time as he, or " theſe employed by him, ſhall be reaſonably gratified for their aſſiſtance " and trouble, or good ſecurity given for that purpoſe." And by the ſame

ſame ſtatute it is provided, That if the owners and ſalvers do not agree upon what is a reaſonable gratification, it ſhall be adjuſted by any three of the neighbouring Juſtices of the Peace, and that their determination ſhall be binding on all parties. The ſtatute alſo provides, "That goods which "are of their own nature periſhable, ſhall be furthwith ſold by the Col- "lector, and that after deducing all charges, the reſidue of the price, with "a fair and juſt account of the whole, ſhall be tranſmitted to the Ex- "chequer, there to remain for the benefit of the rightful owner."

In *September* 1748, *Brunton* and *Chalmers* ſent a ſhip loaded with wheat from *Leith* to *Zealand*; the ſhip was by ſtreſs of weather ſtranded on the coaſt of *England*, near the port of *Stockton*. *Wilſon*, the Collector of the cuſtoms at that port, upon hearing of the diſaſter, cauſed land the wheat, and put it into granaries. *Chalmers*, having got notice of the ſhip's being caſt away, went to *Stockton* to look after the cargo; and finding that the wheat was damnified by ſea-water, and in danger of being totally loſt, if not ſoon diſpoſed of, he advertiſed a roup of it, and offered to depoſitate the whole money which ſhould ariſe from the ſale in *Wilſon*'s hand, as a ſecurity for any demand which he might have for ſalvage; but *Wilſon* would not allow the wheat to be ſold, alledging, that he had orders from the Commiſſioners of the cuſtoms to ſtop the ſale. Whereupon *Chalmers* proteſted againſt *Wilſon*, that he ſhould be liable for all the damages which might ariſe by the wheat not being ſold.

About ſix months after this, *Wilſon* applied to three neighbouring Juſtices of the Peace, in order to have the ſalvage aſcertained; it was accordingly aſcertained upon notice given to the owners.

Some time in the year 1749, *Brunton* and *Chalmers* brought an action of treſpaſs upon the caſe againſt *Wilſon*, before the court of King's bench, and the cauſe having come to trial by a jury at *Newcaſtle*, the jury returned a ſpecial verdict, finding the facts proved as above ſet forth, but leaving it to the Court to determine whether *Wilſon* was guilty of a treſpaſs or not.

The Judge at the circuit referred the matter to the Court of King's bench at *Weſtminſter*; that Court found *Wilſon* not guilty, and awarded *L.* 60 *Sterling* of coſts againſt *Brunton* and *Chalmers*.

*Wilſon* brought an action againſt *Brunton* and *Chalmers* before the Court of Seſſion, concluding for payment of the ſaid *L.* 60 *Sterling*; againſt which it was *pleaded* by the defenders, That the decree of the Court of King's bench could not be the foundation of any execution in this country, unleſs in ſo far as the decree was ſupported in equity, and that the decree purſued on was evidently iniquous; becauſe, as the wheat had periſhed thro' the fault of the purſuer, in not allowing it to be ſold, he ought to have been found liable to them for the damage thereby ſuſtained.

*Anſwered* for the purſuer: 1*ſt*, That, as the defenders did not offer to the purſuer the ſalvage-money, he was intitled by the ſtatute of the 12th of Queen *Anne*, to retain the cargo until that was paid; and therefore he was juſtly acquitted, and coſts decreed to him by the Court of King's bench. 2*dly*, That it could not now be enquired, whether the Court of King's bench had judged right or not, for *res judicata pro veritate habetur*, and that not only within the territory where the judgment is pronounced, but alſo *ex comitate* in foreign countries, agreeable to the opinion of *Voet* in his commentary, *Tit. de re judicata*, N° 41. where he obſerves, that the judge of one territory ought to interpoſe his authority for carrying

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ing into execution the ſentence pronounced by a judge of another territory, without entering into a thorough diſcuſſion of the merits of the judgment: his words are, *Nec eam ad examen penitus revocet, ſed pro juſtitia ejus ac aequitate praeſumat.* From this rule he only mentions two exceptions, *viz. Si animadvertat judex requiſitus ſententiam latam eſſe directo contra ſui territorii ſtatuta circa res immobiles in ſuo territorio ſitas; eadem non exſequitur; uti nec ſi alias abſque prolixa cauſæ cognitione conſtet ſententiam nullam eſſe*; neither of which exceptions take place in the preſent caſe. A ſentence pronounced by the judges in *England* ought the rather to be carried into execution by the judges in *Scotland*, becauſe both territories are under one Sovereign, and are but one kingdom; ſo that *ex neceſſitate* rather than *ex comitate*, the ſentences pronounced in one part of the kingdom ought to be carried into execution in the other.

*Replied* for the defenders: The decree was moſt iniquous; for that by the ſtatute 12*mo Annæ*, the Collector of the cuſtoms, or perſon who ſaves the cargo, is directed to ſell ſuch goods as are by their nature periſhable; and therefore, as the wheat was not only periſhable, but actually periſhing, the purſuer ought to have ſold it, altho' the defenders had not required it to be ſold. Further, by the ſtatute the purſuer could only retain the cargo until he got ſecurity for the ſalvage-money, which the defenders offered him, by allowing him to retain the price of the cargo until the ſalvage-money was paid. It is highly proper, that a certain *comitas* be obſerved by the judges of different countries, but the only effect of a *comitas* is to preſume in favour of a foreign decree, that it was juſt, until the contrary be ſhown; but where the injuſtice is made evident, there judges ought not to interpoſe their authority to legitimate injuſtice done to private parties; this is the opinion of *Groenewegen*, in his treatiſe *de legibus abrogatis, ad L.* 75. *ff, de judiciis.* The ſame is the opinion of *Voet*, who, in the place cited for the purſuer, and in his commentary upon the title *de conſtitut. principum, par.* 2. only preſumes for the juſtice of the decree. Agreeable to theſe principles the Court of Seſſion have often decided; particularly 29th *December* 1720, *Edwards* again *Preſcob*, where it was found, that execution ought to paſs upon the decree of the Queen's bench, *unleſs ſomething competent in law or equity could be objected againſt it:* neither does it vary the caſe, that *Scotland* and *England* are under one Sovereign, and are now one kingdom; for it is a fundamental article of the treaty of union, that each of the two kingdoms ſhould after the union be ſtill governed by its own laws; and therefore a decree of any of the courts in *England* has no more force in *Scotland* than a decree pronounced in a foreign country would have.

"The Lords refuſed to give execution for the *L.* 60 *Sterling* of coſts, "awarded by the Court of King's bench." B.

Act. *Grant.* Alt. *Brown.* Reporter, *Kaims.* *Reversed.* Clerk, *Gibſon.*

Nº CLXXIV.

N° CLXXIV. 13th *January* 1756.

*ALEXANDER HAMILTON* of *Pencaitland*, Eſq; Supplicant.

*HAMILTON* of *Pencaitland* diſponed the lands of *Udſtone* to *Thomas Borland*, his heirs and aſſignies, to be held in feu-farm of the diſponer for payment of a high feu-duty, being the ſame with the former rent of the lands.

In *July* 1754 *Borland* became bankrupt, his creditors poinded and carried off his whole moveable effects, and, amongſt others, his corns growing upon the lands of *Udſtone*; but none of the creditors adjudged, or entered to poſſeſs the lands.

In *February* 1755 Mr. *Hamilton* the ſuperior, to whom *Borland* was debtor, both for bygone feu-duties, and for other ſums, applied by petition to the Sheriff of *Lanerk*, ſetting forth, That *Thomas Borland* was unable to ſtock or labour the lands; and therefore craving, that warrant might be granted for ſetting them by roup to one or more perſons, and to ordain the rent to be applied for payment of the feu-duties in the firſt place, and that the remainder, if any was, might be lodged with the clerk of court for behoof of the creditors. The Sheriff granted warrant to the clerk of court to ſet the lands by roup; and it was one of the articles of roup, that the fodder ſhould be conſumed upon the ground; but upon the day of the roup ſome of the creditors repreſented to the Sheriff, that the lands would ſet much higher, if they were ſet in ſmall parcels, and the tenants allowed to carry off the fodder: the Sheriff thereupon granted warrant for ſetting the lands in ſmall parcels, with liberty to carry off the fodder. The lands were accordingly ſet to fifteen different people, who laboured the whole, without leaving any of the lands in graſs, and carried off the fodder.

Mr. *Hamilton* applied by petition to the Court of Seſſion, repreſenting, that if the lands were any longer ſet in that way, the ground would be abſolutely impoveriſhed; and that, altho' where the feu-duty is ſmall the ſuperior has no concern in what way the vaſſal labours the feu, yet, where the feu-duty is equal to the real rent, the ſuperior has an evident intereſt that the land be not miſlaboured; and that, by the *Roman* law, one of the ways of extinguiſhing the contract of *Emphyteuſis*, was, if the *Emphyteuta* had been guilty of miſlabour, or of any other act whereby the ſubject was greatly deteriorated, *Novel.* 120. *cap.* 8. *Auth. qui rem c. De Sacroſanct. eccleſ.* and therefore he prayed a warrant for ſerving the petition upon *Borland*, and for ſetting the farm by roup, under the condition of the tenant's conſuming the whole fodder upon the ground. The petition was ſerved upon *Borland*; but he gave in no anſwers thereto.

" The Lords remitted the petition to the Sheriff, with this inſtruction,
" that he ſhould ſet the lands by public roup, for a term not exceed-
" ing three years, and with the expreſs condition, that the fodder
" ſhould not be carried off the ground." B

For the Petitioner, *Brown.* Clerk *Gibſon.*

N° CLXXV. 14th *January* 1756.

## *JOHN DUNDAS* of *Newhalls*,

against

## The OFFICERS of STATE and MARQUIS of *Tweeddale*.

THE purſuer brought an action of valuation and ſale of the teinds of his lands of *Ferryhill*, in the pariſh of *Inverkiething*, againſt the Officers of State, on behalf of his Majeſty, who, in the right of the *Abbay* of *Dunfermline*, was titular of theſe teinds; and alſo againſt the Marquis of *Tweeddale* tackſman thereof. A decreet of valuation was pronounced without oppoſition; but the defenders objected againſt the ſale, *pleading*, That the teinds which had belonged to the *Abbay* of *Dunfermline* were not ſaleable; becauſe, at the Reformation from Popery, they became the property of the King, in place of the Abbot; and, by the act 192. of the Parliament 1593, both the lands and teinds of this *Abbay*, on the North-ſide of the *Forth*, were annexed to the Crown unalienably: and therefore, in virtue of the acts *James* II. *Parl.* 11. *cap.* 45. and of *James* V. *Parl.* 6. *cap.* 84. and other acts relative to *annexed* property, they could not be ſold without a previous diſſolution in Parliament.

More particularly, by the act 29. 1687, intitled, *For the Annexation of the Temporalities of Benefices to the Crown*, it is declared, " That under the " ſaid annexation, the teind-ſheaves, and other teinds of whatſoever lands " within this realm, *pertaining to any parſonage or vicarage*, are not, or " ſhall not be comprehended, except where the teind and ſtock are lett " together (*i. e.* where there are *decimae inclusae*); in which caſe, it is pro- " vided, that nine tenths of the rent of the lands ſhall be paid to his Ma- " jeſty, and the remaining tenth to the eccleſiaſtical perſon to whom the " teinds belong." And the act alſo excepts from the annexation, " *the* " *haill lands of the Abbay of Dunfermline, which are declared to remain with* " *the Abbay till further order be taken.*"

In the 1589, the Lordſhip, lands, teinds, *&c.* of that *Abbay*, on the North ſide of the *Forth*, were, by way of *morning gift*, granted by the King to *Anne* his Queen, for her life; and the gift was confirmed by the King in 1590, and by acts of Parliament in that year, and in the years 1592 and 1593.

By the 192d act, Parliament 1593, intitled, *Annexation of the Abbay of Dunfermline*, " The whole Lordſhip, lands, teinds, *&c.* belonging to that " *Abbay*, lying on the North ſide of the *Forth*, are annexed perpetually to " the Crown, with ſpecial proviſion, that all the teinds of the ſaid lands " of *Dunfermline* ſhall be underſtood, by virtue of this act, annexed to the " Crown, after the form and tenor of the ſaid general act 1587; *And as* " *all the teinds of the remanent prelacies and kirklands of this realm are an-* " *nexed to the Crown.*"

In 1594, the King did, *de novo*, grant " the *Abbay* lands of *Dunfermline*, " and teinds thereof, to the Queen, and to the heirs of her body by the " King; whom failing, to return to the King and his ſucceſſors in the " Crown of *Scotland.*" And the charter contains a proviſion, diſabling the Queen to alienate without conſent of Parliament.

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In 1618, upon the Queen's death, the *Abbay* lands and teinds deſcended to *Charles* then Prince of *Wales*, her ſon, afterwards *Charles* I. by whom and his tackſmen the ſame were poſſeſſed during his life, and have ever ſince followed the patrimony of the Crown.

Upon this the defenders argued, 1*mo*, That the teinds of *Dunfermline* were annexed to the Crown by the ſaid act 1593; and *alledged*, that the exception of teinds in the act 1587, related only to teinds *pertaining to any parſonage or vicarage*; and therefore the reference which the act 1593 makes to that act as to teinds, could not imply the non-annexation of teinds *pertaining* to the *Abbay*, and which never pertained to any parſon or vicar. Such conſtruction would defeat altogether the annexation of teinds by the act 1593: the reference muſt therefore be applied to the regulations of the act 1587, as to *decimæ incluſæ* only; meaning that theſe regulations ſhould be extended to the *decimæ incluſæ* of the *Abbay*.

2*do*, That the grant to the Queen, and to the heirs of her body by the King, under reſtriction of not aliening without conſent of Parliament, did not alter the nature of the eſtate. It ſtill remained annexed property, and was conſidered as ſuch by Parliament; for the act of annexation, and the act confirming the grant to the Queen, paſſed in the ſame day. Similar are the caſes of the *principality* and of the Earldom of *Roſs*, which are annexed property, tho' poſſeſſed by the firſt and ſecond ſons of the King.

But, even ſuppoſing a temporary diſſolution by the grant to the Queen, yet the acceſſion of King *Charles*, her heir, to the Crown, put an end to that temporary diſſolution. The clauſe of return took place, and theſe teinds *jure coronæ* ſunk into the inheritance of the Crown as annexed property, and as ſuch have been enjoyed ever ſince.

3*tio*, *Charles* I. being in poſſeſſion of theſe teinds in the 1625, his general revocation at that time could not relate to them. That revocation was the ground-work of the ſubſequent proceedings of the Commiſſioners, of the King's decreet-arbitral, and of the act 1633, and other acts for *plantation of kirks and valuation of teinds*, down to the Union. Theſe acts, notwithſtanding the generality of their words, could not be intended to go beyond the ſubjects of the revocation. At any rate, the words of theſe general acts, which were made for other purpoſes, and where the caſe was not immediately under the view of the Legiſlature, cannot by implication be extended to the teinds in queſtion, which were annexed to the Crown unalienably; *without advice, decreet, and deliverance of the haill Parliament, for great and reaſonable cauſes, concerning the welfare of the realm, firſt to be adviſed and digeſtly conſidered by the haill Parliament.*

*Anſwered* for the Purſuer: 1*mo*, The teinds in queſtion ſeem never to have been annexed property; for the general act of annexation 1587 excepts all other teinds but *decimæ incluſæ:* and the words, *pertaining to any parſonage or vicarage*, mean all teinds whatever; for all teinds are either *parſonage* or *vicarage*. And by the reference to this act, made in the particular act for the annexation of *Dunfermline*, the teinds of that *Abbay* were annexed no further, nor in any other manner, than the teinds of the other church lands, none of which were annexed unalienably; therefore the plea of annexation cannot barr the action.

2*do*, Suppoſing theſe teinds were annexed, yet they were again diſſolved by the grant to the Queen, and confirmations thereof in Parliament. The exception of this *Abbay* from the general act of annexation, and the particular act annexing it to the Crown, immediately preceeding the grant to the

the Queen, evidently ſhow that the intent of the annexation was only to recover this eſtate to his Majeſty, free from former alienations of parcels thereof, which could be effectually done only in this way. Thus diſincumbered, it was immediately ſettled upon the Queen, and the heirs procreate between her and the King, as a private eſtate of inheritance; and the grant was ratified by repeated acts of Parliament. In virtue of this, King *Charles* I. ſucceeded to this Lordſhip, not as being heir to the Crown, but as heir to his mother, and compleated his titles as in private rights, and was infeft, and his infeftment duly recorded in 1619. Had he never exiſted, and had there been daughters only of the marriage, the eſtate muſt have deſcended equally among them; or had there been only one daughter, and the King had an heir-male of any ſubſequent marriage, the Crown would have gone to ſuch heir-male, but this eſtate would have deſcended to that daughter. Thus, the eſtate might have been ſeparated from the Crown for ever, and cannot poſſibly be conſtrued to be any part of the annexed property: it could alſo have been alienated by the Queen, and any four of the Council appointed for her affairs. The heirs were under no prohibition from alienating, and could diſpoſe of it at pleaſure; and accordingly, by ſeveral grants of parcels of the Lordſhip, abſolute grants of ſome parts of the teinds thereof, and long leaſes of other parts of thoſe teinds, the eſtate is become of little or no value to the Crown.

3*tio*, The acts regulating the valuation and ſale of teinds, proceed upon the general plan of the good, peace, and tranquillity of the kingdom; with the intent, "*That an univerſal order ſhould be eſtabliſhed within the* "*kingdom, concerning the matter of teinds*, and that every heritor "*ſhould have and bruik his own teinds, of whatſoever nature the ſaid* "*teinds are.*" The act 1690 extends the regulations of former ſtatutes for the ſale of teinds, *to all teinds*, except ſuch as were appropriated for the proviſion of Miniſters; which, altho' allowed to be valued, are exempt from ſale. The ſubſequent acts proceed upon the ſame general plan, and, when exceptions are judged neceſſary, they are particularly mentioned. As therefore no exception of the teinds of annexed property was ever made by any of the acts, ſuch exception cannot now be introduced contrary to the general plan of all theſe ſtatutes, and to the liberal conſtruction which they have uniformly received.

As to the objection, That the acts in the 1633, and ſubſequent acts, ought not to be extended beyond the revocation in the 1625, and the proceedings in the 1628 and 1629, ſaid to be ground-work of theſe acts; and therefore that the teinds of *Dunfermline* being in the 1629 the King's property, could not fall within the revocation and ſubmiſſion; and, by conſequence, not under the ſtatutes relative to the ſale of teinds: *Anſwered*, in the firſt place, That the objection proceeds upon a miſtake in fact; for it ſuppoſes that the revocation in the 1625 found the whole Lordſhip of *Dunfermline* in the King's poſſeſſion at that time; and conſequently no object of the revocation: whereas the fact is, that the revocation expreſsly mentions and annuls ſeveral grants of lands and teinds, part of this very Lordſhip, made by the King's mother and himſelf; and conſequently, by the purſuer's own argument, the teinds of this Lordſhip muſt as much be an object of the acts 1633, as any other in the kingdom. In the *next* place, even the decreet-arbitral, pronounced by the King in the 1627, contains a general regulation for *all teinds*, and, in expreſs words, includes *thoſe belonging to the King*. *Laſtly*, The words of the act 17. Parliament

1633,

1633, are entirely general, without reference to any preceeding tranſaction, which not being made the ground of the act, cannot influence or reſtrain its expoſition.

" The Lords decerned in the ſale of the teinds, parſonage and vica-
" rage of the purſuer's land, at nine years purchaſe, &c." B

Act. *Lockhart.* Alt. *Craigie, Grant.* *Affirmed.*

N° CLXXVI. 16th *January* 1756.

*MICHAEL, JOHN, HERRIES, MARGARET, ANNE,* and *ISOBEL MALCOLMS,* Children of the deceas'd *Michael Malcolm* of *Balbedie,* by *Anne Blackwood* his ſecond Wife, and the ſaid *Anne Blackwood* as Protutor for them,

againſt

*JAMES MALCOLM* of *Balbedie,* only Son of the ſaid *Michael Malcolm* by his firſt Wife.

THE defender ſucceeded to his father as heir of entail to the eſtate of *Balbedie*; the purſuers brought an action againſt him for aliment.

*Pleaded* for the defender: That he ſucceeded to the eſtate of *Balbedie* as heir of entail, and did not repreſent his father; and therefore was not bound to aliment his father's children.

*Anſwered* for the purſuers: That the law of nature dictated, that children, whoſe tender age rendered them incapable of alimenting themſelves, ſhould be alimented by others, by their father in the firſt place, if he be alive, and in a condition to do it, by the publick, if they have no relations able to aliment them: but, where they have one ſo near as a brother, it is a duty incumbent on him to do it; and, were it not ſo, their condition would be worſe than that of foundlings, the offspring perhaps of vice and infamy; becauſe the pariſh may juſtly refuſe to aliment thoſe whoſe brother is the man of the greateſt property in it. By the *Roman* law, brothers, whether they ſucceeded to any thing by their father or not, were bound to aliment indigent brothers and ſiſters, *L.* 1. § 2. *ff. De tut. et rat. diſtr.* And as the *Roman* law is of great authority with us, in all caſes where our municipal cuſtoms do not differ from it, ſo in this caſe, when it is ſo ſtrongly founded in nature and humanity, it ought to be our rule. And, in fact, brothers have often been found liable to aliment their brothers and ſiſters; and, altho' the judgment has ſometimes been put upon the footing of their repreſenting their father, yet that could not be the only, nor indeed the proper, foundation for it: for, altho' the alimenting of children be an obligation binding upon the father, yet, if he has not provided for the diſcharge of it in his lifetime, it has received no civil form; and being therefore merely natural, cannot, in ſtrict law, be made effectual againſt his heir. Nor was it ever found to be effectual againſt a man's heir, except in the caſe of a brother. Thus, altho' the Crown taking by forfeiture, is *ſucceſſor titulo lucrativo* to the forfeiting perſon, yet the Crown was never found to be obliged to aliment the children of the attainted perſon; and therefore it is rather the near relation which is be-

twixt brothers and ſiſters, than the repreſentation of the father, that is the foundation for giving the aliment.

*Replied* for the defender: That, by the law of nature, there lies an obligation on thoſe who are able to give charity towards the alimenting of perſons in indigent circumſtances; but by no civil ſanction is this obligation inforced, nor its extent aſcertained: and to load one perſon with the burden of the whole aliment, even of his neareſt relation, were unreaſonable, except in the caſe of parents and children.

A father is bound to aliment his children; if he refuſe, the laws of this country will compel him; and the obligation which the laws render effectual againſt the father in his lifetime, can alſo be made effectual againſt his repreſentatives: this Court therefore has often found, that an elder brother was bound to aliment his father's younger children; becauſe he repreſented his father *paſſivè*; and the putting the judgment upon that *medium*, was in effect finding, that had he not repreſented his father, he would not have been liable in ſuch aliment. The caſe of a forfeiture is ſingular, and there the Crown is not bound to aliment the children of the attainted perſon; becauſe the forfeiture cuts off or corrupts the blood; ſo that the children can claim and enjoy nothing by or thro' their father.

There is no arguing from the relation betwixt parents and children to the relation betwixt brothers and ſiſters, the relations being altogether of a different kind: and if a brother ſhould be found liable to aliment his brothers and ſiſters, by a parity of reaſoning, failing brothers, couſins would alſo be liable; for their relations differ not in kind, but in degree.

"The Lords found no aliment due." B

Act. *Wedderburn.* Alt. *Hew Dalrymple.*

N° CLXXVII. 20th *January* 1756.

## Ranking of the CREDITORS of *Kinmini'y.*

IN the contract of marriage betwixt *Alexander Sutherland* and *Mary Sutherland*, *Alexander* ſettled his whole eſtate upon himſelf and the heirs-male of the marriage, *&c.* in common form, and a competent jointure upon his wife; after which followed this clauſe: "Provided always, likeas, "it is hereby ſpecially provided and declared, That in caſe there ſhall be "heirs-male of the ſaid marriage, then, and in that caſe, the ſaid *Mary* "*Sutherland* ſhall be bound and obliged, as by the acceptation hereof ſhe "binds and obliges her, to pay yearly to the ſaid heir-male, and failing of "him, to the heir-male of his body allenarly, but to none of the ſaid *A*-"*lexander Sutherland* his other heirs, the ſum of 200 merks *Scots* money, "and two chalders of meal or the price of the ſaid two chalders in mo-"ney, conform to the fiars of the Commiſſariot of *Murray*, in the option "of the ſaid *Mary Sutherland.* And further, if it ſhall happen the ſaid "*Mary Sutherland* to marry another huſband, after the ſaid *Alexander* his "deceaſe, then, and in that caſe, ſhe binds and obliges her, to pay yearly "to the ſaid heir-male, and to the heirs-male of his body, but to none of "the ſaid *Alexander* his other heirs, the ſum of 100 merks *Scots* money,

"and

" and one chalder of meal, or the price thereof, in manner above mention-
" ed; and that by and attour the ſaid 200 merks and two chalders above
" written, and that out of the firſt and readieſt of the maills and duties of
" the ſaid liferent lands; with the payment of which money and victual,
" in the reſpective events aforeſaid, the ſaid liferent-lands, and this preſent
" right is burdened."

At the time of this contract, *Alexander* was clear of debt, and *Mary* brought a fortune with her ſuitable to the proviſions.

Afterwards *Alexander* contracted great debts. Of the marriage there was an heir-male, who, upon *Alexander*'s death, renounced to be heir to him; the creditors of *Alexander* took decreet *cognitionis causâ*, and brought the eſtate to a ſale.

In the ranking of the creditors, *Mary Sutherland* claimed to be ranked for her whole jointure: The creditors *objected*, That, in terms of the proviſo, there being an heir-male of the marriage, ſhe ſhould be cut off from 200 merks and two chalders of meal yearly, of her jointure.

The creditors laid their plea thus: That the proviſo was no other thing than a reſtriction of the wife's jointure in a certain event, and of conſequence an enlargement of the father's fee in that event; but as the fee of the eſtate was provided to the heir-male of the marriage only as a right of ſucceſſion to his father, ſo the benefit of the reſtriction was provided to the heir-male only as a right of ſucceſſion in the ſame manner; and both the reſtricted ſum and the fee of the eſtate being provided to him only *per expreſſum* as heir-male to his father, he has no more intereſt in competition with his father's creditors in the former, than he had in the latter: he cannot take either, except as heir; but to be heir of line he has already renounced; and, if he claims as heir of proviſion, the ſum which he takes muſt be ſubjected to his father's debts.

*Anſwered* for *Mary Sutherland:* The proviſion was not a reſtriction of the wife's jointure to enlarge the huſband's fee, but merely an obligation upon the wife to aliment the heir-male after his father's death: the mother brought a ſuitable portion with her, ſhe had a right to demand this aliment for the heir; the father was clear of debt, he had a right to give it: the preſent creditors ſaw both him thus denuded, and her thus bound, and yet contracted with him. If a third party had ſettled an annuity upon the Lady, for behoof of the heir-male of the marriage, or if *Alexander* had ſettled an annuity upon a third party, under an obligation to pay a part of it to his heir-male, no creditor could have touched it: it would be odd if parents were the only perſons barred by the law from taking care of their own children, when they follow out the ſame methods which would protect their own gifts to the children of others. To intitle the heir-male to take the aliment in queſtion, there is no occaſion for his connecting himſelf with his father. In the proviſo it is only the *hæres deſignativè* that is intended, it is not the *hæres actu*; it is ſufficient for him to ſtand in ſuch a relation, that he might be intitled to ſerve to *Alexander*, if he thought fit.

" The Lords found, That the proviſion in the contract of marriage to
" the heir-male does not diminiſh the Lady's liferent, nor does it be-
" long to the creditors; and therefore preferred the Lady to the cre-
" ditors for her full liferent." I. D.

For the creditors, *Burnet.* Alt. *Ferguſon.* Reporter, *Juſtice Clerk.* Clerk, *Gibſon.*

N° CLXXVIII. 23d *January* 1756.

## *PATRICK SOUPER*

against

The Creditors of *ALEXANDER SMITH.*

*Alexander Smith* being insolvent, did, at a meeting of his creditors, write the following letter, directed to *John Watson:* "I hereby im- "power you to cause roup and sell the furniture of my house, and liquors "in my cellars, for the behoof of my creditors."

In consequence of this letter, *Watson* rouped part of the goods.

*Souper*, a creditor of *Smith*'s, who had not been present at the meeting, arrested in the hands of *Watson*. This brought on a competition betwixt him and the other creditors.

*Pleaded* for the creditors: *Watson* was trustee for them, he was accountable to them, and not to *Smith:* there was a *jus quæsitum* to them by *Smith*'s letter; therefore an arrestment in the hands of their trustee was inept.

*Answered* for *Souper:* The mandate flowed from *Smith*, it was revokable by him, it would have fallen by his death; and therefore the arrestment in the hands of the *mandatarius* was an apt diligence.

"The Lords found, That the goods sold, and the prices thereof recei- "ved by *Watson*, belonged proportionally to the creditors, according "to their debts."

I. D.

Aa. *Hamilton-Gordon.* Alt. *J. Graigie.* Clerk, *Kirkpatrick.*

N° CLXXIX. 27th *January* 1756.

## *ROBERT MURRAY*

against

## *JAMES MANSFIELD.*

WHILE *Wood* a messenger, employed by *Mansfield*, was poinding the goods of *Jackson*, *Meek* a messenger, employed by *Murray*, attempted to join him in the poinding; and when forced by the first to desist from his attempt, took a protest that he should be conjoined in the poinding.

The Lords having found *Murray* intitled to a share of the goods which he had thus been prevented from poinding, a doubt occurred, by what proportion this share should be ascertained, whether the produce of the poinding should be divided equally betwixt both parties, or should be divided in proportion to their debts.

*Pleaded* for *Murray*, the creditor in the lesser sum: He who is debarred from poinding ought to have that value which he would have poinded, had he not been debarred: and it is to be supposed, that one messenger would have poinded as quick, and as much as the other.

*Pleaded*

*Pleaded* for *Mansfield*, the creditor in the greater ſum: In analogous caſes, the diviſion is *pro rata*; as in arreſtments uſed on the ſame day, and in adjudications led within year and day.

It is contrary to equity, that a creditor for a ſmall ſum ſhould receive full payment of his debt, when another, for a great ſum, and equally forward in diligence, does not draw above one tenth part of his.

Beſides, when a meſſenger poinds for two creditors, the produce of the poinding is divided according to the debts. Now, here *Meek* deſired only to be conjoined in the poinding; and conſequently only deſired that the produce of the poinding ſhould be divided according to the debts.

"The Lords found, That the diviſion muſt be *pro rata*, according to "the amount of the reſpective debts, in the ſame manner as if the "parties had been conjoined in the poinding." J. D.

Act *M'Queen.* Alt. *Lockhart.* Clerk *Gibſon.*

## N° CLXXX. 27th *January* 1756.

### Ranking of the CREDITORS on the Eſtate of *Tulloch*.

IN the year 1736, *Margaret Bayne*, a creditor of *Bayne* of *Tulloch*, adjudged his lands of *Tulloch*, and was infeft in *April* 1740.

From *July* 1745 till *November* 1747, four other adjudications were deduced; but no infeftment followed on them.

In *December* 1747, the truſtees of *Andrew Drummond* adjudged the ſame eſtate, and on their adjudication were infeft.

In the ranking of the creditors, on a judicial ſale of the eſtate of *Tulloch*, it was allowed that *Margaret Bayne* was the preferable creditor; but a diſpute aroſe for the next preference, betwixt the four next adjudgers, and the truſtees of *Drummond*.

The queſtion came to be, whether in adjudications without year and day of the firſt effectual one, the next adjudgers not infeft, or adjudgers after them being infeft, ought to be preferred.

*Pleaded* for the adjudgers infeft: The effect of the firſt adjudication and infeftment is not to denude the debtor of the property of the lands under redemption, but only to give the creditor a *pignus praetorium*, or right in ſecurity: an adjudication creates not a transfer of the property, but only an incumbrance on it; conſequently one cannot be fully diveſted but by infeftment; and therefore the laſt adjudgers firſt infeft muſt be preferred.

The general rule of the law of *Scotland*, is, That in land-rights which are compleated by infeftment, the firſt infeftment is preferable, even where the diſponer himſelf has only a perſonal right to the lands, and may appear to have been denuded of that perſonal right by his diſpoſition; yet his laſt diſponee laſt infeft is preferred to his firſt diſponee not infeft: in adjudications, which are only legal diſpoſitions, the ſame rule ſhould take place.

*Pleaded* for the adjudgers not infeft: An adjudication is not a *pignus praetorium*; on the contrary, in its origin in the Statutes of *Alexander* II.

and *James* III. it was ſimply a ſale at a price, under a faculty of redemption, competent to the debtor within ſeven years.

In conſequence of this, the debtor being denuded of his right to his lands, in favour of the firſt adjudger, by charter and ſaſine, and nothing remaining with him but a right of reverſion, this right of reverſion is carried by a ſecond adjudication, as effectually without infeftment as with it.

When a debtor is denuded of a part of his lands by infeftment upon a proper wadſet, the right of reverſion, which remains with him, is fully carried by adjudication without infeftment; adjudications are legal conveyances under reverſion. The ſame rules, then, which apply to the reverſion of other redeemable ſales, or wadſet-rights, apply to them.

The argument for the adjudgers not infeft is ſtrengthened by expediency: for if every creditor without the year was obliged to take a new infeftment from the ſuperior, to prevent his being cut out by the ſubſequent diligence of other creditors, the burden upon creditors would be increaſed, and their fund of payment leſſened.

" The Lords preferred the ſimple adjudications without infeftment, ac-
" cording to their dates, notwithſtanding the infeftment upon the ad-
" judication at the inſtance of *Drummond*'s truſtees." J. D.

For the truſtees, *Lockhart*. Alt. *Ferguſon*. Reporter *Kaims*. Clerk *Kirkpatrick*.

N° CLXXXI. 28th *January* 1756.

## *HOUSTOUN* of *Johnſtone*
againſt
## *STEUART NICOLSON* of *Carnock*.

IN the 1711, Lady *Schaw* executed a ſtrict entail of her eſtate of *Carnock*, in favour of her daughter Lady *Houſtoun* as inſtitute, and a certain ſeries of heirs.

Of the ſame date, ſhe aſſigned over to her daughter certain annuities owing by her ſon Sir *John Schaw*, and took an *obligation* from her, that theſe annuities ſhould be employed in purchaſing of lands, or laid out upon good ſecurity to the ſame heirs, and under the ſame proviſions as the eſtate of *Carnock*.

In the 1740, Lady *Houſtoun* recovered by a law-ſuit *L.* 2026 of theſe annuities, and lent them to Lord *Napier*, upon his heritable bond, payable to herſelf, her heirs and aſſignies: but this ſum being afterwards paid up by Lord *Napier*, it was lent out to different hands, upon perſonal bonds taken to Lady *Houſtoun*, her heirs or aſſignies.

Lady *Houſtoun* executed a general diſpoſition of all her effects to her daughter Mrs. *Cunningham* of *Enterkin*, burdening her with payment of her debts, and with employing the *L.* 2026, in terms of the above *obligation* and entail.

Lady *Houſtoun*, in her ſon Sir *John Houſtoun*'s contract of marriage, diſponed to him the eſtate of *Carnock*, and died in *January* 1750. Sir *John* lived till *July* 1751; but never made any demands upon Mrs. *Cunningham* of *Enterkin* for the *L.* 2026, either principal or intereſts, nor made up any title

tle to them. Upon his death a competition aroſe between *Houſtoun* of *Johnſtone* his executor nominate, and the heir of entail of *Carnock*, concerning the intereſts of that ſum, which had become due during Sir *John*'s apparency. The *heir* contending that they were *in hæreditate jacente* of the Lady *Houſton*, and now carried by his general ſervice to her. And the *executor*, that Sir *John* had the *right* to theſe intereſts; which *right* is now tranſmitted to him.

*Pleaded* for the heir: Sir *John* certainly died in the ſtate of apparency with regard to this money. A ſervice was neceſſary to veſt it in him. Lady *Houſtoun* was firſt fiar and inſtitute, and the next heir could not take but by a ſervice to her. By bare exiſtence they could not come into her right, without making up a title to ſhow that they were the heirs called by the deſtination: the foreign axiom, *Mortuus ſaſit vivum* has no place in the law of *Scotland*. Had the money remained with Lord *Napier* upon heritable ſecurity, or if it had been employed in purchaſing land in terms of the entail, it could not be veſted in Sir *John* without a ſervice; and its being upon perſonal ſecurity will make no difference.

The rents of lands, and the intereſts of bonds unpaid during the life of an apparent heir, do not go to his executors. A feudal right cannot be eſtabliſhed without infeftment, and when once eſtabliſhed, it cannot be tranſmitted, but by particular forms. The heir neglecting theſe forms, and dying in a ſtate of apparency, is no more regarded in queſtions concerning the eſtate, than if he never had exiſted. But the heir complying with theſe forms, and making up his title by ſervice, connects with the predeceſſor laſt veſted and ſeaſed, and his infeftment is drawn back *fictione juris* to that predeceſſor's death, and carries all right which was in him.

Upon this principle it is, that an adjudication *contra haereditatem jacentem* has been found to carry the rents which fell due, during the time of an intermediate apparent heir, *Dict.* of *Dec. vol.* i. *f.* 358. And likewiſe, that adjudications upon a ſpecial charge do carry bygones from the death of the predeceſſor laſt infeft, 13th *February* 1740, *Dickſon*. If theſe rents go to the executors of the apparent heir, they could not be carried by theſe adjudications; the creditor adjudger muſt purſue the executor for them, tho' the apparent heir neither repreſented the debtor, nor was liable in the debt; and the adjudger would be liable to repeat theſe rents to any perſon who ſhall confirm executor to the apparent heir. But ſuch rents are carried by theſe adjudications, and muſt likewiſe be carried by a ſervice which has been found to be equal to an adjudication.

As an apparent heir is conſidered in law to have no connection with the eſtate, any privileges indulged to him with regard to that eſtate are *invita juriſprudentia*; the progreſs of the law in admitting ſuch privileges may be ſeen in the *Dict. vol.* i. *f.* 358. So far as he poſſeſſes and uplifts the profits, he cannot be challenged; but there the law ſtops: the rents unuplifted do not tranſmit to his executors; becauſe his privilege of poſſeſſion cannot be transferred to them. In the ſame manner as in heirſhip-moveables, poſſeſſion is a compleat title without ſervice; but, if the heir die without attaining poſſeſſion, they do not belong to his executor, but paſs to the next heir. And, in like manner, poſſeſſion, is a compleat title in other moveables poſſeſſed by neareſt of kin, without confirmation; but, if they have not poſſeſſed, they do not tranſmit to their executors.

Theſe principles have been eſtabliſhed by repeated deciſions, obſerved in the *Dict. vol.* i. *f.* 358. particularly in the caſe of *M'Brear*. And by the opinion of our beſt lawyers. *Vid. Stair*, *f.* 199. and 200. *M'Dowall*, *vol.* ii. *f.* 324. and *Erſkine*, *f.* 372. And as theſe deciſions and opinions have been

been univerſally underſtood, and men have accommodated their ſettlements to them, it becomes highly dangerous to deviate from them, even tho' they were erroneous.

*Pleaded* for the executor: There was no *feudum pecuniae* here conſtituted, to which Sir *John* could make up titles by ſervice. He was directly creditor to Lady *Houſtoun*, by her obligation granted to her mother; and, after her death, he was creditor to her repreſentatives. He could have purſued upon that obligation, without producing any ſervice, which is never neceſſary *ad factum demonſtrandum*, and where no ſubject is to be carried by it. The caſe is ſimilar to the obligation in a contract of marriage to ſecure a ſum to the heirs of the marriage. If the obligation is implemented, the heirs muſt take by ſervice: but, if the ſum is not ſecured in terms of the obligation, the children are creditors, and need no ſervice, 2d *February* 1732, *Campbell contra Duncan*; 16th *February* 1737, *Keith contra Coutts*. Here, if a ſervice was neceſſary, it was ſupplied by the diſpoſition of the eſtate of *Carnock* to him.

But, allowing that a ſervice was neceſſary, and that Sir *John* died in a ſtate of apparency, it was ſtill contended, that the intereſts in queſtion belonged to his executor. The law has given to apparent heirs many important rights and privileges. The moſt important of all theſe, is the intereſt he has in the rents of his predeceſſor's eſtate: he can force the tenants to pay; his creditors can affect them by arreſtment, either during his life, or after his death, 20th *December* 1662, Lady *Tarſapie*. Theſe powers can ariſe from no other principle, than that the rents belong to him, as they fall due, whether they be uplifted or not; and of conſequence go to his repreſentatives.

This intereſt of an apparent heir is a *right* in him diſtinct from the *right* of *property*, both as to its conſtitution and effects. The right of property can only be conſtituted and tranſmitted by particular forms, and theſe may not be ſupplied by equivalents; but the right of poſſeſſion ariſes *ipſo jure* to the heir, by the operation of the law. No form or act on his part is neceſſary. It devolves upon him without his knowledge, as in the caſe of an heir abroad or an infant, 18th *July* 1727, Sir *Alexander Ogilvie* againſt Sir *Alexander Reid*: if therefore the rents are carried by this *poſſeſſory title*, and if an apparent heir has a *right* to them, that *right*, with every other moveable right, paſſes to his executor.

This diſtinction between the right of *property* and of *poſſeſſion*, is laid down by Lord *Stair*, in many places of the *Inſtitutes*, *L.* 2. *tit.* 1. § 22. *tit.* 3. § 16. *L.* 3. *tit.* 5. § 2. The deciſion *M'Brear*, as collected by *Stair*, 1ſt *July* 1681; and by Preſident *Falconer*, 20th *November* 1683, ſtands with the executor. Lord *Harcus* indeed makes an addition to this deciſion; but this reſts upon his ſingle authority, and is in ſome meaſure an abſtract point, not in the caſe; and the other deciſions collected in the *Dictionary*, reſt too upon his evidence, which will not be held ſufficient authority to ſet aſide a ſyſtem of law founded on principles, ſupported by Lord *Stair*, and confirmed by deciſions.

" The Lords preferred the executor." W. S.

For executor, *Craigie, Lockhart & Wallace.* For heir, *Ferguſon & W. Stewart.*

## N° CLXXXII.

N° CLXXXII. 28th *January* 1756.

## *HOUSTON* of *Johnſtone* againſt *STEUART NICOLSON.*

LADY *Schaw* entailed her eſtate of *Carnock* and certain *annuities* which were afterwards found to amount to *L.* 2026, in manner mentioned in the former deciſion, upon her daughter Lady *Houſton* as inſtitute.

This entail contains a clauſe, declaring, " That the ſaid Lady *Houſton* " *her heirs of tailzie* ſhall have power, each of them, to provide their re- " ſpective huſbands and wives in a competent liferent out of the foreſaid e- " ſtate, not exceeding a juſt third of the rents thereof, by way of locality, " *which is to be in full to them both of courtſey and terce.*"

By an after clauſe in the end of the entail, ſhe appoints her daughter to employ the *annuities* to buy lands and annex the ſame to the entailed eſtate, " and take the rights to herſelf and the heirs of tailzie, under the " ſame *proviſions, conditions, declarations, clauſes irritant and reſolutive, a-* " *bove expreſſed.*"

In the year 1744, Sir *John Houſton*, apparent heir to Lady *Houſton* in the eſtate of *Carnock*, was married to Miſs *Cathcart*; and in the contract of marriage Lady *Houſton* diſponed to Sir *John* her eſtate of *Carnock*: and Sir *John* granted his Lady a liferent-infeftment of a third of the ſaid lands, and became bound to pay her a further annuity of 1600 merks yearly: " And, " for her further ſecurity of the ſaid annuity, Lady *Houſton* aſſigned to her " a third part of the yearly intereſt of the *L.* 2026, at that time lying in " Lord *Napier*'s hands, upon heritable ſecurity." And, on the other part, Miſs *Cathcart* " aſſigned to Sir *John* her bond of proviſion of *L.* 2000, " *L.* 500 thereof to himſelf ſimply, for his own behoof, and the other " *L.* 1500 to him in truſt, for her ſecurity of the liferent-annuity of 1600 " merks yearly, and of the proviſions ſtipulated to the daughters of the " marriage; and after theſe are ſatisfied, to Sir *John* for his own uſe and " behoof."

Lord *Napier* having paid up the *L.* 2026 to Lady *Houſton*, ſhe lent it out to ſundry debtors upon perſonal bonds; and having executed a general diſpoſition of all her effects to Mrs. *Cunningham* of *Enterkin*, ſhe burdened her with employing the *L.* 2026 in terms of the entail.

Lady *Houſton* and Sir *John* being both dead, Mr. *Houſton* of *Johnſtone*, Sir *John*'s executor, brought a proceſs, concluding, That Mrs *Cunningham* ſhould lay out the *L.* 2026, in terms of the entail, to the end that a new right and ſecurity might be granted to Sir *John*'s widow, to the extent of a third part of the intereſt of that ſum, and that *Steuart Nicolſon*, the heir of entail, ſhould be decerned to relieve him, the purſuer, of the ſaid annuity to that extent.

*Pleaded* for the heir: 1*mo*, Lady *Houſton* had no power by the entail, to burden the lands with any annuity. She was married, and the mutual proviſions betwixt her and her huſband aſcertained before the entail was made; this faculty of granting liferents is therefore confined to her *heirs of tailzie*, no ſuch power is given, or meant to be given to her the *inſtitute*.

2*do*, The faculty of burdening with the liferent extends only to the *entailed eſtate of Carnock*; for it is declared, That a locality of a third part of that eſtate ſhall be *in full* of both courtſey and terce. And, if this money were fixed down under ſuch a burden, the purpoſe of the entailer to have it laid out in purchaſing lands, muſt be diſappointed.

3*tio*, This faculty could not be uſed by Lady *Houſton* in favour of the wife of her ſon. The heirs are allowed to provide their *reſpective huſbands and wives* in liferents, but not the huſbands or wives of their apparent heirs.

4*to*, Sir *John*, by his contract of marriage, is clearly the principal debtor in the additional annuity of 1600 merks; Lady *Houſton*'s interpoſition in favour of the young Lady is only for her *further ſecurity*, it cannot relieve the principal debtor or his repreſentatives. On the contrary, Sir *John*'s executor muſt relieve and diſburden the *L.* 2026, as Sir *John* has left enough to pay all his debts.

*Pleaded* for Mr. *Houſton* in anſwer to the *firſt:* Lady *Houſton* acting in concert with her ſon Sir *John*, who was an heir of entail, and was impowered by the entail to give his wife a liferent, did not exceed her powers in granting the ſecurity now in queſtion.

To the *ſecond:* The *L.* 2026 is to be ſettled under the ſame *proviſions* and *conditions* with the eſtate of *Carnock*.

To the *third:* That Lady *Houſton* could diſpone her whole eſtate to her ſon, who was *alioqui ſucceſſurus*; ſhe might therefore, *a fortiori*, give this liferent to his widow. *Qui poteſt majus poteſt minus.*

To the *fourth:* No traces of a *principal* and *fidejuſſory* obligation can be diſcovered in this marriage-contract; there is a perſonal obligation upon Sir *John*, and a real ſecurity granted by Lady *Houſton*, and the perſonal obligation muſt be abſorbed in the real ſecurity. If it were not ſo, in every heritable bond, the heir of the debtor would be intitled to a relief againſt the executor, as theſe bonds, in their uſual ſtyle, always begin with a perſonal obligation to pay, and, for the creditor's *further ſecurity*, the debtor becomes bound to infeft him in particular lands; yet unqueſtionably ſuch bond belongs to the heir of the creditor, and muſt be paid by the heir of the debtor.

It was further inſiſted for Mr. *Houſton:* That Sir *John*, by ſurviving his mother, became creditor in this entailed money, which veſted in him without a ſervice; and as after his mother's death, he had undoubted power to grant this liferent-proviſion to his Lady, his ſucceſſion as *jus ſuperveniens* muſt operate *retro* to render valid that liferent-proviſion which his mother, with his conſent, in his own marriage-contract, had granted.

To this it was *anſwered:* Sir *John*'s ſurvivance could not eſtabliſh a right in him to this entailed ſubject, without a ſervice. And, *ſeparatim*, *jus ſuperveniens* to a conſenter will not confirm the right conſented to, altho' it may be otherwiſe, *ubi jus ſupervenit* to the principal diſponer.

" The Lords found, That Lady *Houſton* had power to provide the wife " of her ſon the apparent heir, in his contract of marriage, in a join- " ture, to the extent of a third part of the entailed money, and that " the repreſentatives of Lady *Houſton* are bound to implement the ſaid " obligation." W. S.

Act *Craigie, Lockhart & Wallace.* Alt. *Ferguſon & W. Steuart.* Clerk, *Forbes.*

N° CLXXXIII.

N° CLXXXIII. 28th *January* 1756.

## *EDWARD PRIMROSE*

against

## *JOHN PRIMROSE.*

IN the 1737, *John Primroſe* diſponed his lands of *Burnbrae* to the purſuer, his heir at law: but, in the 1752, when betwixt 70 and 80 years of age, and confined to his bed, he deſtroyed that diſpoſition, and diſponed the lands to the defender, the ſon of his natural brother.

*John Primroſe* neither went to kirk nor market after executing the laſt diſpoſition, and died within 41 days of its date.

The purſuer obtained himſelf ſerved heir in general to *John Primroſe*, and brought a reduction of the diſpoſition 1752, upon the head of death-bed.

The defender *contended*: That the deceas'd was not on death-bed when he executed the deed, but was only confined to his bed by old age, and a weakneſs in his feet: that he died of an apoplexy, with which he was ſeized eight days before his death.

" The Lords allowed a proof to both parties of the condition of the " health and capacity of the deceas'd, at the time of his granting the diſ- " poſition quarrelled, and for ſome time before and afterwards to the time " of his death."

At adviſing of the proof, the purſuer *pleaded* from the evidence, that the deceas'd had been ſeized with the gout in his hands and feet, about 14 years before his death; and that the fits of that diſtemper generally recurred upon him twice a-year: That he had been ſeized with an iliac paſſion about a year and a half before his death: That this diſtemper was removed by proper medicines; but that his conſtitution had been thereby impaired: That watery ſwellings appeared in different parts of his body; and that he had remained bed-rid for ſeveral months before his death: That the Surgeon who had formerly attended him, and who had occaſion to ſee him about a week before his death, depoſes, That, in his opinion, the iliac paſſion threw him into a lingering diſtemper, whereof he at laſt died: That other perſons who ſaw the deceas'd both before and after the date of the deed quarrelled, depoſe, That he appeared to be *in trouble*, and to be an infirm and *dying man:* That, a few days before his death, he was ſeized with a trembling fit, and from that time became ſenſibly weaker and weaker till he died; but that this fit muſt not be conſidered as a new diſtemper, but as the criſis of the diſtempers under which he had long laboured.

The defender *anſwered:* That, at the time of executing the deed, *John Primroſe* did not appear to have contracted the diſeaſe whereof he died, nor indeed to have been affected with any diſeaſe at all. He was confined to his bed by old age and a weakneſs in his feet, occaſioned by former fits of the gout. He was ſeized with a trembling fit a very few days before his death, and more than a month after he had executed the diſpoſition quarrelled: from that fit is the diſeaſe whereof he died to be dated, the iliac paſſion being an acute diſtemper, could not be the cauſe of his death after an interval

val of a year and a half. Neither could the gout be the cauſe of his death; for that it was fixed in the extremities of his body, and a gout of that nature is not held to be a diſeaſe rendering one incapable of diſpoſing of heritage. Beſides, the deceas'd was not actually affected with the gout when he executed the diſpoſition quarrelled, but had only contracted a lameneſs from former attacks of that diſtemper. The ſudden illneſs whereof he died, can no more be connected with the gout and iliac paſſion, than an ague in one year, and a flux in the next, can be connected with a fever whereof one dies in the third year.

"The Lords found the reaſon of reduction relevant and proven, and reduced the deed." B.

Act. *A. Pringle & Bruce.* Alt. *Miller & Lockhart.* Clerk, *Kirkpatrick.*

## N° CLXXXIV. 4th *February* 1756.

The MINISTERS and HERITORS of *Eyemouth*, and Procurator for the Church,

againſt

The OFFICERS of STATE as Patrons, *William* Earl of *Home* as Titular, and the Heritors and Miniſter of *Swinton*.

THE pariſhes of *Swinton*, *Paxton* and *Eyemouth* were parts of the erected priory of *Coldingham*; and the ſtipends of theſe pariſhes were allocated in ſuch manner, that the Miniſter of *Swinton* received about three chalders of victual out of the teinds of *Paxton*, and one chalder out of the teinds of *Eyemouth*. The commencement of this allocation, which was probably made to ſerve the convenience of the titular, did not appear; but by the record of an old proceſs in the 1663, touching the right of the priory of *Coldingham*, betwixt the Earl of *Home* and Sir *Alexander Home*, it appeared, that, in the year 1643, the Miniſter of *Swinton* had a decreet of augmentation, whereby he had three chalders eight bolls victual of the readieſt of the teinds of *Coldingham*.

In the year 1675, the Miniſter of *Eyemouth* obtained a decreet of augmentation, which allocated to him the chalder, payable out of *Eyemouth* to the Miniſter of *Swinton*; but the Miniſter and heritors of *Swinton* were not made parties to that decreet.

In the year 1676, the Miniſter of *Swinton* raiſed a proceſs of locality againſt the titular and heritors of *Swinton*, *Paxton* and *Eyemouth*, concluding for payment of his ſtipend, and particularly of this chalder from *Eyemouth*, according to uſe and wont. In this proceſs, the Miniſter of *Eyemouth* appeared for his intereſt, and *pleaded* ſundry defences; but at the ſame time ſaid, he would not oppoſe the ſaid chalder being paid to the Miniſter of *Swinton*, provided he were reponed againſt his own decreet 1675, that he might get his augmentation out of other teinds in his pariſh.

The titular and heritors of *Paxton* appeared alſo, and *pleaded:* That *decimae debentur parocho*, both by the canon law, and by our acts of Parliament; and that the arbitrary allocation of the titular could not prejudge the law.

Upon

Upon this debate, the Lords gave judgment in favours of the Miniſter of *Swinton*, allocating to him the ſaid chalder from *Eyemouth*, the three chalders from *Paxton*, and the remainder from *Swinton*; and they reponed the Miniſter of *Eyemouth* againſt his decreet 1675.

In the ſame year 1676, the Miniſter of *Eyemouth* inſiſted in a proceſs of augmentation and locality, reciting and founding upon the Miniſter of *Swinton*'s decreet; and he obtained a decreet giving him an augmentation out of the other teinds in his pariſh.

Thus matters reſted, till the preſent Miniſter of *Eyemouth*, and the other purſuers brought a new proceſs of augmentation; and, in order to enlarge the fund, they concluded for a reduction of the Miniſter of *Swinton*'s decreet 1676, and inſiſted upon the following reaſons:

1*mo*, That, as it does not appear the then Miniſter of *Eyemouth* was called in the proceſs at the Miniſter of *Swinton*'s inſtance in 1676, his voluntary compearance and conſent could not bind his ſucceſſors in office.

2*do*, That the decreet was informal, and was inconſiſtent with the 15th act 1672, upon which it is founded: that act declares, *That the commiſſioners ſhall have power to appoint conſtant local ſtipends to ilk Miniſter, out of the teinds of the pariſh where they ſerve the cure*; and yet the decreet concludes for a locality out of the other pariſhes, according to uſe and wont.

3*tio*, By the act 1617, *James* VI. *p.* 22. *cap.* 3. and act 1633, *Charles* I. *p.* 1. *cap.* 19. the Commiſſioners are impowered to modify and ſet down a conſtant local ſtipend to ilk Miniſter, to be *paid out of the teinds of ilk pariſhen*. By plain conſtruction of theſe, and the whole other acts concerning plantation of kirks and valuation of teinds, and of the decreet-arbitral of *Charles* I. the Commiſſioners had no power to give a ſtipend to any Miniſter out of any other pariſh than that in which he ſerves the cure; and the heritors had a right to purchaſe all their own teinds, except ſuch as were allocated to their reſpective Miniſters; by conſequence, the Miniſter of *Swinton*'s decreet 1676 was againſt law, and *ultra vires* of the Commiſſioners: it was therefore void and null, and could not be the foundation of preſcription, far leſs be *res judicata* againſt the purſuers: That, at any rate, preſcription cannot bar heritors from valuing and purchaſing their teinds *quandocunque*, nor bar Miniſters from augmentation and modification, altho' a former decreet be the title of the Miniſter's poſſeſſion. Theſe principles had influenced the Lords in two caſes, *viz.* in the caſe of the Miniſter of *Dun*, 4th of *February* 1711, and of the Miniſter of *Inchtuir*, 28th *November* 1716.

*Anſwered* for the Defenders: That the decreet 1676 was moſt juſt and equitable: the Miniſter had at that time been in poſſeſſion immemorial, as appeared from the record before mentioned; and the heritor of *Swinton* had purchaſed his teinds in the 1649, upon the faith that the chalder from *Eyemouth* was to continue part of the Miniſter of *Swinton*'s ſtipend: That, as to the *firſt* reaſon of reduction, it was not neceſſary to call the Miniſter of *Eyemouth*; and, at any rate, his compearance was equivalent to his being called.

To the *ſecond:* That the act 1672, upon which the Miniſter of *Swinton* libelled, refers to all former acts. So the libel was laid upon all the laws and acts concerning teinds, and muſt receive its conſtruction from them all.

To the *third*, which was the material objection, *anſwered*: 1*mo*, That the words of the act of Parliament founded upon, are only deſignative of the funds for the payment of each Miniſter's ſtipend, but are not reductive of old allocations to other pious uſes: That altho' the Commiſſioners might not have power to make a new allocation of teinds to a Miniſter out of another pariſh, yet they had ever ſuſtained themſelves competent to maintain a Miniſter's poſſeſſion of ſuch teinds: That inſtances of pariſhes in a ſituation ſimilar to that of *Swinton* were very numerous, and it would introduce great confuſion to eſtabliſh a precedent for alterations in this particular: That the Miniſter of *Swinton*'s ſettlement was *res judicata* againſt all the parties here, and could not be opened. 2*do*, *et ſeparatim*, Whatever objections of informality or injuſtice might have elided the defence of *res judicata*, had they been offered within the years of preſcription, whatever powers this Court may have to open their decreets within theſe years, yet as this was a decreet of the proper Court, it was a good foundation of preſcription; and as the Miniſter of *Swinton* has poſſeſſed upon it more than forty years, it is not now liable to any challenge. With regard to the caſes quoted for the purſuers, they are not ſimilar to this caſe. In the caſe of *Dun*, the Miniſter of *Maryton*'s poſſeſſion was not founded upon a decreet; and, 2*do*, The Interlocutor taking the teind-bolls from him was really of conſent: and, in the caſe of *Inchtuir*, the Miniſter had neither decreet nor poſſeſſion.

" The Lords repelled the reaſons of reduction of the decreet of locality " of *Swinton*; and alſo aſſoilzied the Miniſter and heritors of *Swin-* " *ton* from the reduction." B.

Act. *Pringle & D. Dalrymple.* Alt. *Miller, Bruce & Swinton.*

N° CLXXXV. 10th *February* 1756.

## *CHRISTIAN CUMMING*

againſt

## His Majeſty's ADVOCATE.

IN the year 1692, *Adam Hay* obtained a charter of the lands of *Aſlied*, to himſelf in liferent, and to his ſon *Andrew* in fee; whom failing, to certain ſubſtitutes.

By this charter there was reſerved to *Adam* a power of contracting debt, and of diſpoſing of the lands. Infeftment was taken upon this charter.

*Andrew* died; and *Adam*, in the year 1726, executed the reſerved faculty, by diſponing the lands of *Aſlied* to his grandſon *Adam Hay*; whom failing, to the ſubſtitutes contained in the charter 1692.

This *Adam*, after the death of his grandfather, engaged in the Rebellion 1745, and was forfeited. His eſtate was ſurveyed for the Crown: *Chriſtian Cumming*, the widow of *Andrew*, entered her claim for a terce of the lands of *Aſlied*, in the fee whereof her huſband had died infeft.

*Objected* for his Majeſty's Advocate: The property of the eſtate of *Aſlied* muſt, in reſpect of the reſerved faculty, be held to have been in *Adam*

*dam*; his ſon *Andrew* was a nominal fiar only; and conſequently his widow is not intitled to a terce.

*Anſwered* for the Claimant: By the deed 1726, *Adam* meant to ſave his grandſon the expence of a ſervice to *Andrew*, not to recal the fee which had been veſted in *Andrew*. Neither could he prejudice the right of the claimant which had already taken place by the predeceaſe of her huſband *Andrew*; at leaſt, no perſonal deed of his could be effectual in competition with his ſingular ſucceſſors deriving right from *Andrew*, or with *Andrew*'s creditors infeft. See the caſe, *Rome* againſt the creditors of *Graham*, *February* 1719, obſerved by *Kaims*, N° 16. and, by parity of reaſon, ſuch deed cannot be good againſt the widow claiming a terce; for that a widow, as to her terce, is upon the ſame footing as a creditor with infeftment.

" The Lords diſmiſſed the claim." D.

Act. *Burnet.* Alt. *M'Queen & King's Council.* Reporter, *Auchinleck.*

N° CLXXXVI. 10th *February* 1756.

## *WILLIAM FERGUS*

againſt

## *AGNES RAMSAY.*

*AGNES RAMSAY* brought a proceſs againſt *William Fergus*, before the Juſtices of Peace of *Stirlingſhire*, for the ſum of *L.* 50 *Sterling*, part of which ſhe alledged was due to her, as a legacy left her by her deceas'd huſband, whom the defender repreſented, and the remainder was due by an open accompt, which ſhe offered to inſtruct by the defender's oath.

*William Fergus* declined the Juſtices of Peace as incompetent, and offered no other defence.

The Juſtices decerned for the ſums libelled, and for *L.* 4. *Sterling* of expences.

*William Fergus* offered a bill of ſuſpenſion of this decreet, and prayed that the decreet might be ſuſpended without caution or conſignation; for that it was void and null, being pronounced by an incompetent Court.

The Lord Ordinary reported the bill; and the Lords were of opinion that the decreet was void and null; and therefore,

" The Lords paſſed the bill without caution or conſignation." B.

For *Fergus*, *Bruce.* Reporter *Kaims.*

N° CLXXXVII.

N° CLXXXVII. 12th *February* 1756.

## *LILIAS BREBNER*, and others,

against

## *JOHN LAW.*

*JEAN CAMPBELL* made an entail of her eſtate of *Lauriſtoun* to *John Law* her eldeſt ſon, and his male-iſſue; whom failing, to *William Law* her third ſon, and his male-iſſue, paſſing over *Andrew* her ſecond ſon, and his iſſue; whom failing, to her neareſt heirs whatſoever, under certain proviſions and limitations.

By her death, the right of ſucceſſion devolved upon *John Law* her ſon; he poſſeſſed the eſtate until his death, but made not up titles to it.

By his death, the right of ſucceſſion devolved upon *William Law:* he was ſerved heir general of tailzie and proviſion to his brother *John*, by which ſervice the perſonal right to the entail, and to the procuratory therein contained, became veſted in him.

*William* diſponed the eſtate of *Lauriſtoun* in liferent to himſelf, and in fee to his ſon *John*, and his male-iſſue, whom failing, to the heirs whatſoever of *Jean Campbell*, under the proviſions and limitations contained in the entail above mentioned.

In terms of this diſpoſition, *William* and *John* his ſon obtained a charter, and were infeft.

*William Law* died in *France*, where he had been long ſettled, leaving two ſons, *John* and *James*, both reſiding in foreign parts.

They had attained the age of fifteen years compleat before the death of their father, had been educated in the Popiſh religion, and continued to profeſs it.

The purſuers therefore, as heirs at law of *Jean Campbell*, being deſcended from her ſecond ſon, took out a brieve from the Chancery, in order to have themſelves ſerved, in terms of the ſtatute 1700, *neareſt and lawful heirs-portioners of tailzie*, of the reformed religion, *in general*, to *William Law*.

The ſervice was oppoſed by *John Law*; and it was *objected* for him: 1*mo*, That the purſuers cannot be ſerved heirs of proviſion to *William Law*; for that his right was only a right of liferent, and ceaſed at his death, the right of property is veſted in the defender by charter and infeftment; and this right muſt be ſet aſide before the purſuers can make up titles to the lands of *Lauriſtoun*. 2*do*, The ſtatute 1700 does not call the next Proteſtant to the ſucceſſion, unleſs the Popiſh heir neglect or refuſe to renounce Popery in the manner preſcribed; that is, that the renunciation be made, either before the Preſbytery within whoſe limits the heir reſides, or before the Privy Council, who might undoubtedly grant commiſſion for adminiſtring the *Formula* to one reſiding in foreign parts. Now, neither of the alternatives can here take place: not the former, for that the defender reſides not within the limits of any Preſbytery: not the latter, for that the Privy Council of *Scotland* is aboliſhed by the act 6*to Annæ*; and this part of its juriſdiction has not been veſted in any other Court.

*Anſwered*

*Anſwered* for the purſuers: 1*mo*, *William Law*, by his general ſervice as heir of proviſion to his brother *John*, carried the procuratory of reſignation, and the perſonal right to the eſtate, which had been ſettled upon *John* by the entail of *Jean Campbell*. *William* did indeed execute this procuratory, and took the real right to the eſtate, in favour of himſelf in liferent, and of his ſon, the defender, in fee: but the liferent-right ceaſed by the death of *William*, and the right of fee is void by the ſtatute 1700; the perſonal right therefore to the eſtate muſt be conſidered as remaining *in hæreditate jacente* of *William*, in the ſame manner as if no infeftment of fee had ever been taken in favour of the defender; and this perſonal right will be veſted in the purſuers by that ſervice, in which they inſiſt. To ſuſtain the plea of the defender, would be to invalidate the ſtatute 1700; for that he whoſe heir was a Papiſt might take the right of lands to himſelf in liferent, and to the Papiſt in fee; and, upon his death, the Papiſt would be ſecured, by pleading that he was in the fee, and could not be diveſted by the ſtatute 1700. 2*do*, The incapacity under which the Popiſh heir falls by the ſtatute 1700, is not from his refuſing to take the *Formula*, but from his profeſſing Popery after having attained the age of fifteen. He may remove this incapacity by taking the *Formula* in the manner preſcribed by the ſtatute. He may either repair to *Scotland*, and take the *Formula* before any Preſbytery in *Scotland*, or he may take it before the *Britiſh* Privy Council. The Privy Council of *Scotland*, and the *powers and authorities* belonging to it, are aboliſhed by the act 6*to Annæ*; but the *voluntary* act of the Popiſh heir in appearing before the Privy Council, can, in no propriety of ſpeech, be termed a *power* or *authority* of that judicatory; ſo that the *Formula* may ſtill be taken before his Majeſty's Privy Council for *Great Britain*, the only Privy Council which now ſubſiſts. It is evident, that, according to the defender's plea, a Popiſh heir might, by withdrawing himſelf into foreign parts, be altogether exempted from taking the *Formula*: were this plea ſuſtained, the proviſion made by the ſtatute 1700, for the ſecurity of the Proteſtant religion, would be rendered ineffectual.

"The Lords repelled the objections, and allowed the ſervice to pro-
"ceed." *Affirmed*. D.

Act. *Miller*. Alt. Sir *J. Stewart*, *Ferguſon*. Clerk, *Juſtice*.

N° CLXXXVIII. 13th *February* 1756.

*ARCHIBALD ARBUTHNOT*, *ROBERT GORDON*, and *MARGARET GORDON*,

againſt

*ELISABETH ARBUTHNOT*.

IN *July* 1750 *Robert Arbuthnot*, in his marriage-contract with *Mary Arbuthnot*, became bound to ſecure *L.* 900 *Ster.* of his own, and *L.* 700 of his wife's, with half of the conqueſt to the wife in liferent, and to the children of the marriage in fee, declaring, That whatever he ſhould be worth at the diſſolution of the marriage over *L.* 1600, ſhould be eſteemed conqueſt; in

caſe one daughter only ſhould exiſt of the marriage, the fee of the *L.* 1600 was declared reſtricted to *L.* 800.

Of this marriage there was one daughter *Elizabeth.*

In *February* 1752, the father then reſiding in *England*, executed a will, in which " he ratified his contract of marriage, and bequeathed to his " wife *L.* 200 over her proviſions by that contract, and bequeathed all the " reſidue of his eſtate to his daughter *Elizabeth*, ſubject nevertheleſs to his " contract of marriage."

" In caſe his daughter *Elizabeth* ſhould die in the lifetime of her mo- " ther before majority or marriage, then he bequeathed to his wife all his " plate and furniture, and alſo bequeathed to her the reſidue of his eſtate, " ſubject nevertheleſs, after her deceaſe, to the payment out of the ſaid " ſum of *L.* 1600 of ſeveral legacies in favour of *Robert Arbuthnot*, *Ro-* " *bert* and *Margaret Gordon*, amounting to *L.* 1000, and the remaining " *L.* 600, reſidue of the ſaid ſum of 1600, he gave and bequeathed to " ſuch perſon as his wife ſhould appoint; and failing ſuch appointment, " to her neareſt in kin." The wife and other friends he named executors.

At the time of making this will, 10,000 merks of the *L.* 1600 was heritably ſecured in *Scotland*; and therefore could not be conveyed by teſtament.

Soon after, the teſtator died, and the wife, as executrix named, intromitted with all his effects both in *Scotland* and *England*, except the heritable bond.

*Elizabeth* the daughter died in *July* 1753; and *Mary* the wife having returned to *Scotland*, alſo died in *March* 1754, having made a ſettlement in favour of *Elizabeth Arbuthnot* her ſiſter.

An action was brought by the legatees againſt *Elizabeth*, who produced an accompt, by which it appeared, that the total fund, excluſive of the heritable bond, amounted to *L.* 1052 *Sterling.*

*Pleaded* for *Elizabeth:* That ſhe was intitled, in right of her ſiſter, *Firſt*, To retain *L.* 200 as a *praecipuum*, to which *Mary* the wife became intitled immediately upon the death of the teſtator, leaving a daughter; and as this *L.* 200 was given to the wife, in preference to the daughter of the marriage, much more was it meant to be given to her in preference to the legatees. *Secondly*, That ſhe ought to be ranked on the balance for *L.* 600 equally with the other legatees.

*Anſwered* for the legatees: The defunct's laſt will contains two ſeparate ſettlements of his whole eſtate in two ſeveral events. If his daughter *Elizabeth* ſhould ſurvive her mother, or ſhould live till majority or marriage, he then gave to his wife *L.* 200, and all the reſt to his daughter: but if his daughter ſhould predeceaſe his wife before majority or marriage, he then ſettled his whole fortune in a different manner; he gave *L.* 1000 of legacies to the purſuers, and the reſidue, which he believed would amount to *L.* 600, he gave to his wife.

In the event, therefore, of the daughter's dying under age, it was not intended that *Mary* ſhould have *L.* 200, as well as 600, ſince the teſtator's effects, at the time of making the will, amounted only to *L.* 1600, and were not ſufficient to pay *L.* 800 to her, and *L.* 1000 to the other legatees.

Neither could ſhe claim to be ranked equally with the other legatees for *L.* 600; becauſe that ſum was not left to her as a ſpecial legacy, but was conceived

conceived in terms of a reſiduary legacy; and altho' the teſtator had expreſſed what he imagined would be the amount of the reſiduary legacy, yet, as the form of words in which the legacy was conceived would certainly have intitled *Mary* to any ſurplus, if the funds had exceeded *L.* 1600, the ſame form of words muſt alſo be held to import a reſiduary legacy, ſo as to burden her with the loſs ariſing from the deficiency of the funds. In ſupport of this *L.* 75, § 2. *f. De legatis*, 1*mo*, was quoted.

*Replied:* The teſtator evidently intended by the will to favour his wife more than the other legatees: he bequeathed to her indeed *L.* 600, after the other legacies, and in form of a reſiduary legacy, not with any intention to ſubject her alone to the burden of any deficiency, but becauſe he believed no deficiency would happen; and thought it therefore immaterial in what form the legacy was conceived. The words annexed to her legacy of *L.* 600 ought in this caſe to be conſidered in the ſame light as a *falſa demonſtratio* in the civil law, and not as a *falſa cauſa*.

" The Lords found, That in the event which had happened, the wife " had no right to the ſum of *L.* 200 as a *praecipuum*; but that ſhe " had right to the ſum of *L.* 600, as a ſpecial legacy equal with the " other legatees."

J. D.

Act. *Johnſtone.* Alt. *D. Dalrymple. Lockhart.* Clerk, *Juſtice.*

N° CLXXXIX. 24th *February* 1756.

## The INHABITANTS of *Stromneſs*

againſt

## The BURGH of *Kirkwall.*

BY many acts of Parliament, the freemen of royal burroughs have an excluſive privilege of importing certain commodities, as wines, wax, ſpices, ſilks, *&c.*; and by act 5. 1672, it is declared, " That, if any man " not being freeman in the royal burroughs, ſhall be found to have in his " poſſeſſion any goods or commodities to be bought or ſold, exported or " imported by him, contrair to this preſent ſtatute, and the privilege of " the royal burroughs granted thereby; the ſaids whole goods ſhall be e- " ſcheat, the one half to his Majeſty, and the other half to the Burgh " apprehender: and that, if the ſaids goods be apprehended within any of " the ſaids royal burroughs, or the ſuburbs or appendicles belonging to " them, or within their ports or harbours, the ſamin may be ſummarly " ſeiſed and ſecured, as goods eſcheat in manner foreſaid; but if the ſaids " goods competent only to freemen of the royal burroughs ſhall be found, " or alledged to be found elſewhere, they ſhall only be arreſted and pur- " ſued to be declared eſcheat, to be divided in manner above written, be- " fore any judication as accords of the laws: and that, upon pretence " thereof, the Magiſtrates of burghs, or others by commiſſion from them, " or any of their inhabitants, ſhall not ſearch or ſeize upon any goods, or " any way trouble or moleſt his Majeſty's good ſubjects living without the " bounds of their ſaid burghs or ſuburbs, ſummarly, and by way of fact, " but only by legal proceſs, according to law, upon the pretence of any pri-

" vilege,

" vilege, cuſtom or uſage whatſoever, unleſs the perſons be deprehended " in the preſent and actual tranſgreſſion of the privileges of the royal bur- " roughs above written, and that within the bounds of the ſaids burghs, " ſuburbs and ports thereof, under the pain of being proceeded againſt as " committers of riot, and diſturbers of his Majeſty's peace."

The Burgh of *Kirkwall*, under pretence that the inhabitants of *Stromneſs* imported prohibited goods, obtained from the Sheriff of the county warrants of arreſtment, and arreſted in the hands of many of the inhabitants of *Stromneſs*, all ſuch prohibited goods as were then in their poſſeſſion. Upon this arreſtment the Burgh obtained a decreet of forthcoming, and took decreet againſt the ſeveral arreſtees for *L.* 50 each, as held confeſſed, for not deponing in the forthcoming.

The inhabitants of *Stromneſs* ſuſpended, and *pleaded:* That only the actual ſeizure of the prohibited goods, and not the arreſtment of them, could be the foundation for a proceſs againſt them: That prior to the act 1672, the Magiſtrates could ſeize the prohibited goods, whether found within or without Burgh; That by the act 1672, the law remained the ſame as to goods found within Burgh; and an alteration was made as to goods found without Burgh, namely, that the Magiſtrates, inſtead of ſeizing them directly themſelves, were obliged to apply to the Judge Ordinary to make the ſeizure: That to *ſeize* and to *arreſt*, were ſynonimous terms in the old Law-books of *Scotland*; and therefore when, in the latter part of the clauſe of the ſtatute, the Magiſtrates were allowed to *arreſt*, that meant they were to *ſeize*, as much as when, in the former part of the ſtatute, they were allowed to *ſeize*; and therefore, either within or without Burgh, the actual ſeizure was the firſt ſtep neceſſary in order to afford a foundation for the proceſs: That arreſtments of moveables in the hands of a party were contrary to the genius of our law, which allowed no embargoes of this kind upon moveables; and that it was ſtill more repugnant to the genius of our law, to compel the ſubjects, in penal caſes, where forfeitures are to inſue, to ſwear either againſt or for themſelves.

*Pleaded* for the Burgh: That, prior to the act 1672, the Magiſtrates could ſeize the prohibited goods, whether within or without Burgh: That the ſeizure, in this laſt caſe, ſtretching the juriſdiction of the Burgh without its bounds, ſeemed too great a power; and therefore a check was put to it by the act 1672, namely, that without their own bounds, the Magiſtrates ſhould only arreſt, in order to be a foundation for an action: That, tho' the words *ſeizure* and *arreſtment* were ſynonimous in the old Law-books, yet, long prior to the act 1672, they had a meaning fixed totally different from each other; and accordingly they are contra diſtinguiſhed in the former and latter part of the clauſe in queſtion.

" The Lords found, That the goods not having been deprehended and " arreſted in the hands of the ſuſpenders, are not ſubject to confiſca- " tion; and that the ſuſpenders are not obliged to depone upon the " quantities in their hands." *Affirmed.* J. D.

Act. *Ferguſon, & alii.* Alt. *Lockhart, & alii.* Clerk, *Pringle.*

N° CXC.

N° CXC. 25th *February* 1756.

## *JOHN STRATON* of *Lauriſton*

againſt

## The NEW COLLEGE of *St. Andrews.*

THE lands of *Lauriſton* lye in the pariſh of *Marytoun*; the teinds belonged to the Biſhoprick of *Brechin* until the abolition of Epiſcopacy in the 1690, when they became veſted in the Crown; the lands belonged to the Earl of *Middleton*, and were appriſed from him in the 1670. On this appryſing Colonel *Charles Straton* obtained a charter in the 1695, wherein a clauſe *cum decimis tam rectoriis quam vicariis* is contained; which clauſe is repeated in all the ſubſequent charters. In the 1721, Colonel *Straton* obtained from the Crown a leaſe of the teinds of *Lauriſton*, which leaſe was renewed in the 1740, and is ſtill current. In a proceſs of augmentation, modification and locality, raiſed by the Miniſter of *Marytoun*, the queſtion occurred, Whether the teinds of *Lauriſton* were to be conſidered as belonging heritably to *Straton*, or as poſſeſſed under leaſe.

*Straton* of *Lauriſton pleaded:* That the teinds were heritably conveyed to his predeceſſor by charter from the Crown, and have been tranſmitted in all ſubſequent charters, during a ſpace much longer than is required by the act 1617. Neither can the leaſes of the teinds, which have been inadvertently taken, vacate this heritable right, or imply a dereliction thereof; the teinds therefore muſt be held as belonging heritably to *Straton*, and the augmentation localled accordingly.

*Anſwered* for the New College of *St. Andrews*, as having right to other teinds in the pariſh of *Marytoun:* The queſtion is not, whether an heritable right already eſtabliſhed to the teinds of *Lauriſton* has been vacated or derelinquiſhed, but whether ſuch heritable right has ever been conſtituted in the perſon of the proprietor of *Lauriſton.* The act 1617 requires not only heritable infeftments, but alſo continued poſſeſſion for forty years: now, *Straton* and his authors have not *poſſeſſed* the teinds as heritors, but as tenants by leaſe from the Crown. The conſequence of the argument uſed by *Straton* would be, that, if an heritor can once procure a clauſe *cum decimis* to be inſerted in his charter and ſaſine, he may continue to take leaſes of the teinds from the Crown, and after the expiry of forty years, may plead an heritable right to the teinds by poſitive preſcription, notwithſtanding his poſſeſſion as tenant.

" The Lords Commiſſioners found, That Mr. *Straton* had no ſufficient " heritable right to the teinds of *Lauriſton.*" D.

Act. *A. Wedderburn, Ferguſon.* Alt. Sir *D. Dalrymple.* Reporter, *Shewalton.*

N° CXCI. 27th *February* 1756.

*EVAN BAILLIE*, and others,

against

His Majesty's ADVOCATE.

THE pursuers had become cautioners for Lord *Lovat* in the 1741; and being distressed by the creditors, they entered a claim upon the forfeited estate of *Lovat*, for the sums they had been obliged to pay, and likewise for the expences laid out in entering and prosecuting their claim.

*Objected* by his Majesty's Advocate: 1*mo*, No part of these expences did exist at the time the estate of *Lovat* became vested in the Crown: they are debts contracted after the 24th *June* 1747; and therefore cannot be charged upon this estate. Besides, they were not a debt existing at the time of entering the claim. 2*do*, By the vesting act no decree can pass against the Crown for penalties. And it has been a rule constantly observed, not to give the expences of claims, however just the claims may be; and there appears no reason for establishing a different rule in the case of cautioners claiming relief; seeing every creditor is equally intitled to recover from the debtor what expence he may be put to in making his debt effectual.

*Answered* for the claimants: To the *First*, The debt did exist before the estate was vested in the Crown, being clearly implied in the obligation in the bond of relief, by which Lord *Lovat* was bound to keep them free and skaithless of this cautionary obligation, which certainly includes every expence necessarily incurred by means of it. To the *second*, This claim is not properly a penalty, but a part of the obligation of relief; and the claimants are in a very different situation from creditors claiming upon a simple bond or obligation; for that, from the nature of relief, interest is always allowed upon interests paid by the cautioner, but it is otherwise with every other creditor.

" The Lords dismissed the claim as to the expences of entering and pro-
" secuting thereof." W. S.

*Act. Burnet.* *Alt. King's Council.* Reporter, *Prestongrange.* Clerk, *Kirkpatrick.*

N° CXCII. 27th *February* 1756.

*HODGES*

against

Mr. *BRYCE*, Minister of *Kirknewton*.

THE Presbytery of *Edinburgh* designed *Outfield*, which had been in the constant use of being ploughed, and lying in grass three years alternately, for the Minister's pasturage.

*Alledged* for the heritors, in a suspension; Arable land cannot be designed. The statute 1663, *c.* 21. ordains *L.* 20 *Scots* to be paid yearly, if

if there be no kirk-lands lying near the Miniſter's manſe, *or if the ſaid kirk-lands be arable land:* and this matter was ſo determined 31ſt *January* 1712, as obſerved by *Fountainhall.*

*Anſwered:* The ground deſigned is bare, with a large rock in the middle of it; and, as it has confeſſedly been in uſe to lie ſometimes lee, it might be deſigned. The conſtruction which the heritors put upon the act goes too far; few Miniſters would be intitled to graſs, if no ground could be deſigned, any part of which is arable. The deciſion from *Fountainhall* does partly ſupport the deſignation. It was found, "That the he-"ritors muſt not, *in aemulationem,* till up that which was in uſe to be lee, "ſince ſo they might leave nothing for the Miniſter but moſs, muir, hills "or rocky ground, to the defrauding the good deſign of the law, and the "Miniſter's manifeſt prejudice."

"The Lords refuſed the bill." W. S.

Act. *W. Wallace.* Alt. *D. Dalrymple.* Clerk, *Home.*

N° CXCIII. 2d *March* 1756.

## *EMILIA* and *MARGARET FARQUHARSONS*

againſt

## *JAMES FARQUHARSON.*

THE lands of *Inverey* and *Tullich*, holding of ſubject ſuperiors, belonged to *John Farquharſon*; he had iſſue, by his firſt marriage, two ſons, *Patrick* and *Charles*, by his ſecond, *James*, the defender.

The antient deſtination of the lands aforeſaid was to heirs-male; but the lands were evicted from *John*, and purchaſed by his ſon *Patrick.*

*Patrick* obtained charters of reſignation from his ſuperiors, and took the ſucceſſion of the ſaid lands deviſed "to the heirs-male of his body; "whom failing, to his heirs-male whatſoever; whom failing, to his heirs "and aſſignies whatſoever."

*Patrick* was married twice; by his firſt marriage he had iſſue daughters only. In the 1714, by marriage-contract with his ſecond wife, he provided the ſaid lands "to the heir-male of that marriage; whom failing, "to his heirs-male whatſoever; whom failing, to his heirs and aſſignies "whatſoever." This contract contains a procuratory of reſignation, in the terms above mentioned.

Of this marriage he had iſſue, two ſons, *Joſeph* and *Benjamin*, and two daughters, the purſuers.

In the 1737, *Patrick* died, and was ſucceeded by his ſon *Joſeph*, who died alſo in the ſame year, without compleating his titles. He was ſucceeded by his brother *Benjamin*, who, in 1738, made up titles to the lands of *Inverey* and *Tullich*; and dying ſoon after, was ſucceeded by his uncle *Charles*, brother-german of *Patrick.*

This *Charles*, in the 1721, executed a deed of the following tenor: "For certain reaſonable cauſes, he ſells, aſſigns and diſpones to, and in "favour of *Patrick* his brother, *his heirs and aſſignies whatſoever*, all lands, "heritages, tenements, annualrents, debts, ſums of money, heritable "and moveable, and all goods whatſoever which ſhall happen to pertain

"to

" to him the time of his deceaſe, whenever the ſame ſhall happen." This diſpoſition is granted with the burden of all debts contracted or to be contracted, reſerves a power to alter even on death-bed, and contains a clauſe diſpenſing with delivery.

In the 1739, *Charles* executed a procuratory for reſigning the eſtate of *Auchloſſan*, his own purchaſe, in favour of himſelf and the heirs-male of his body; whom failing, to *his other heirs-male*.

Afterwards, in the ſame year, *Charles* was ſerved heir-male in general to his nephew *Benjamin*, the perſon laſt infeft, and alſo obtained precepts of *clarè* for infeftment in *Inverey* and *Tullich*, as heir to him.

Upon the death of *Charles*, in the 1747, *James*, his brother conſanguinean and heir-male, took poſſeſſion of the eſtate of *Inverey* and *Tullich*, in virtue of the inveſtitures to heirs-male.

*Emilia* and *Margaret*, the daughters of *Patrick*, inſiſted in an action againſt *James*, for having it declared that they, in virtue of the diſpoſition in the 1721, had right to the lands of *Inverey* and *Tullich*, as *heirs whatſoever* of *Charles*, and that *James* ſhould make up titles and denude himſelf in their favour.

*Pleaded* for the defender: The purſuers cannot take by the deed 1721; for that, 1*mo*, It being conceived in favour of *Patrick* firſt, and then of his children, can beſtow no more on them than on him: now, it could not mean to beſtow on him the lands of *Inverey* and *Tullich*, which were already his property. *Charles* had in view the event of *Patrick*'s ſucceeding to him, not the event of his ſucceeding to the eſtates of *Patrick*; as *Charles* had no expectation of this laſt event, he cannot have had any intention of providing for it; conſequently the words, *heirs whatſoever*, are words without intention, and as ſuch, ineffectual in law. But, independent of this, 2*do*, Altho' the expreſſion, *heirs whatſoever*, does, in the abſtract, imply *heirs of line*; yet, when it is uſed in any particular deed, it muſt be explained according to the intention of the diſponer, and the nature of the ſubject diſponed. As in the 1721 the inveſtitures of *Inverey* and *Tullich* were to the *heirs-male* of *Patrick*; the words, *heirs whatſoever* of *Patrick*, muſt be underſtood of *heirs-male*, which character belongs to the defender. By that expreſſion *Charles* could not have intended *heirs of line*; for that, in the 1739, he deviſed *Auchloſſan* to heirs-male: now, he never could have deviſed his conqueſt to heirs-male, and *Inverey* and *Tullich*, his paternal inheritance, to heirs of line.

*Anſwered* for the purſuers: He who grants a general diſpoſition of whatever ſubjects ſhall belong to him at his death, has no ſpecial lands or moveables in view. Such diſpoſition conveys not particular ſubjects, but the chance of ſucceeding to *all* ſubjects whereof the diſponer ſhall die poſſeſſed; the extent of what is conveyed will be aſcertained from the condition of the diſponer's eſtate at his death. Thus, in the preſent caſe, *Charles*, when he executed the deed 1721, had no view to *Inverey* and *Tullich*; yet, as thoſe eſtates devolved to him, they come under the deſcription of " all " lands belonging to him at the time of his death," and fall to the purſuers as *heirs whatſoever* of *Patrick*, called by the deed 1721. As *Charles* ſurvived *Patrick*, he ſaw that event which is ſaid to have been unforeſeen; yet did he not revoke the deed 1721, neither can the Court. The ſettlement of *Auchloſſan* in the 1739, can have no further effect than as to the eſtate thereby ſettled.

2*do*,

2*do*, To the argument from the ſuppoſed ambiguity of the expreſſion *heirs-male whatſoever*, it is anſwered; That the expreſſion is variouſly interpreted in purchaſes of rights, but not in ſettlements. When a purchaſer is unwilling to communicate to the ſeller the nature of his family ſettlements, he takes his purchaſe to *heirs whatſoever*: this expreſſion will, in law, be limited or extended according to the ſettlements; but in the ſettlements themſelves it has a determined technical meaning, and muſt imply *heirs of line*.

"The Lords found no action competent to the purſuers, in virtue of "the deed 1721 againſt the defender, to oblige him to denude of "the eſtates of *Inverey* and *Tullich*." *Affirmed*. D.

Act. *Miller, Brown, Lockhart.* Alt. *Wedderburn, Garden, Ferguſon.* Clerk, *Kirkpatrick*.

N° CXCIV. 2d *March* 1756.

*ALEXANDER* Duke of *Gordon*

againſt

*DONALD M'PHERSON.*

*GORDON* ſold to *M'Pherſon* the lands of *Kinguiſſie*, redeemable by payment, "on a *Whitſunday*'s eve, of 4000 merks *Scots* haill and to-"gether, in one ſum of current gold and ſilver having paſſage for the "time."

The Duke of *Gordon*, in right of the reverſer, did, on the eve of *Whitſunday* 1755, execute an order of redemption againſt *M'Pherſon*; and, he not appearing, conſigned the ſum ſtipulated in notes of the Bank of *Scotland*: the Duke then inſiſted in a declarator of redemption.

*M'Pherſon objected*: That the order of redemption was null; for that it was proved by the inſtrument of conſignation, that *Bank-notes* had been conſigned, whereas the clauſe of reverſion required *gold and ſilver*; and he *pleaded*, that an order of redemption muſt be obſerved in the ſpecific form required; that when the clauſe of reverſion mentions one ſpecies of money, no other can be obtruded, *Sinclair*, 15th *May* 1547, *Ogilvie* againſt *Balfour*, *tit. Reverſions*, *p.* 456. *Spotiſwood*, *p.* 261. This rule has been ſo ſtrictly obſerved, that even when the ſpecies covenanted was not to be had, payment could not be made in another, without the authority of Parliament, 37th *act*, 2. *Parl. Q. Mary*. Since then in reverſions one ſpecies of money cannot be legally tendered in lieu of another, *a fortiori*, Bank-notes cannot be legally tendered in lieu of money. The notes of the Bank of *Scotland* are nothing more than the notes of a trading company; the credit indeed of that company is intire, but it is liable to various accidents, has been impaired by civil commotions, and may be deſtroyed by any publick calamity; payment therefore made in ſuch notes cannot be deemed equivalent to payment in gold and ſilver. A conſignation in bills at ſight accepted by the wealthieſt merchants in *Scotland*, would not, in the preſent caſe, have been held a proper conſignation, much leſs can Bank-notes; for that ſuch bills may be inſtantly diſcounted, the payment of Bank-notes may be poſtponed for ſix months; the former are ſubjected to

diligence by horning, the latter are not, 11th *July* 1728, *Royal Bank* againſt *the Old Bank*.

*Anſwered* for the Duke of *Gordon*: Our antient deciſions required redemptions to be made in the preciſe form preſcribed by the letters of reverſion, even when ſuch form was of no moment to the wadſetter. The equity of modern practice has mitigated this rigor. Thus, antiently, in redemptions, the actual production of a procuratory was required; but now, it is ſufficient that a procuratory do exiſt, and be produced on demand. In like manner, a conſignation of a diſcharge of a debt ariſing from the contract of wadſet, is held as equivalent to a conſignation in money, 2d *January* 1667, *Hodge* againſt *Hodge*.

While the value of our coin was perpetually fluctuating, there was an eſſential difference to the wadſetter between payment in one ſpecies and payment in another: on this principle the deciſions quoted for *M'Pherſon* proceeded; but now that the value of our coin is fixed, there is no ſuch difference.

The accepted bills of merchants are in no ſort equivalent to Bank-notes: the credit of the Bank is greatly ſuperior to the credit of any private merchants; and were the whole proprietors of Bank-ſtock to become bankrupt, their ſtock would be transferred to their creditors, but the credit of the Bank itſelf would not be impaired.

Further, Bank-notes have been held equivalent to money, 31ſt *January* 1737, *Crawfurd* againſt *Stewart*; where the conſignation of Bank-notes by one attempting to poind the goods of the tenant, was found ſufficient to ſatisfy the hypothec claimed by the maſter.

Bank-notes may be uſed in conſignations, even altho' it ſhould be granted that they cannot be obtruded as legal payment. The purpoſe of a conſignation is to afford evidence that the reverſer is ready to pay, and that the wadſetter is *in mora*. After the form of conſignation has been compleated, the reverſer may take up his money; nor need he pay it again, until he either obtain a renunciation from the wadſetter, or a declarator of redemption againſt him. On the other hand, the wadſetter is not bound to renounce his wadſet-right, until legal payment be made to him. Had he, in this caſe, appeared, and refuſed to accept Bank-notes, the ſum would have been paid down in gold and ſilver; he cannot, by not having appeared, receive an advantage, which he would not have received, had he appeared.

But, *ſeparatim*, the order of redemption, however informal, muſt be ſuſtained, to the effect of enabling the reverſer to redeem at *Whitſunday* 1756, in terms of the wadſet: for that he now inſiſts in a declarator of redemption againſt the wadſetter. This is analagous to the practice in warnings; an action of removing, brought on an informal warning, is ſuſtained to the effect of decreeing the tenant to remove at the next term, without any further warning; as in that caſe an action of removing is conſidered as a warning equivalent to that required by ſtatute: ſo, in this caſe, a declarator of redemption ought to be conſidered as equivalent to the form of redemption required by paction.

" The Lords ſuſtained the order of redemption and conſignation, to this
" effect, that the purſuer may redeem the lands by payment or con-
" ſignation, upon the term of *Whitſunday* 1756, of 4000 *merks* in one
" ſum of current gold and ſilver, having paſſage for the time; and,
" upon

" upon the purſuer's making ſuch payment or conſignation, found " the lands redeemed from and after the ſaid term." D.

Act. *Johnſtone, Ferguſon.* Alt. Sir *D. Dalrymple.* Reporter, *Auchinleck.*

N° CXCV. 2d *March* 1756.

## *CATHERINE DRUMMOND*

againſt

## *ROBERT STEWART.*

*CATHERINE DRUMMOND*, mother to *Robert Stewart* an idiot, alimented him from the year 1721, till the year 1751: he had no fortune whatever; in that year he ſucceeded to the eſtate of *Ardvorlick*, of *L.* 840 *Scots* yearly rent. In the year 1756, *Catherine Drummond* brought a proceſs of aliment againſt her ſon, concluding for aliment from the 1721 till the 1751, as well as after this laſt period.

" The Lords found no aliment due till the 1751; and, after that pe- " riod, modified *L.* 40 to the purſuer." J. D.

Act. Alt. *And. Pringle.*

N° CXCVI. 3d *March* 1756.

## EARL of *SELKIRK*

againſt

## *JOHN DALRYMPLE* of *Stair.*

ON the 21ſt *May* 1739, *John* late Earl of *Stair* executed a ſettlement of his honours and eſtate, in form of a ſtrict entail, in favour of Captain *John Dalrymple* his nephew, and of certain other heirs therein named, with a proviſo that the Earl ſhould have power to alter the ſettlement at any time in his life.

On the 2d *June* 1739, he alſo executed a diſpoſition of the lands of *Drummuckloch* and others, " In favour of the Captain, and heirs-male to " be procreate of his body; whom failing, of the other heirs of entail con- " tained in, and conform to a bond of tailzie of the Earl's lands and eſtate, " made and ſubſcribed by him upon the 21ſt *May* laſt paſt." And, upon the 4th of *February* 1740, he executed another diſpoſition of the lands of *Breiſtmiln* and others, " in favour of the Captain, and the heirs-male of " his body; whom failing, of the other heirs of tailzie ſpecified in a bond " of tailzie of the Earl's lands and eſtate of *Stair*, made and granted by " him upon the 21ſt of *May* laſt paſt; but with and under the conditions, " proviſions, declarations and clauſes irritant and reſolutive contained in the " ſaid bond of tailzie."

Upon both the diſpoſitions laſt mentioned, Captain *Dalrymple* was publickly infeft, and his ſaſine thereon duly regiſtrated.

Captain

Captain *Dalrymple* contracted conſiderable debts, particularly the ſum of *L.* 1600 *Sterling* by bond, to the deceas'd *Baſil Hamilton*, dated 12th *January* 1740, to which the Earl of *Selkirk*, the purſuer, has right by progreſs. Captain *Dalrymple* died in the beginning of the year 1742.

On the 31ſt *March* 1747, the Earl of *Stair*, upon a recital of the ſettlement 1739, and of the alterations that happened among the heirs of entail thereby nominated, made a further ſettlement of his honours and eſtate, and which he declares, " was not intended to hurt or derogate from " the foreſaid entail, but rather to explain, corroborate and make the ſame " compleat." And as in this laſt ſettlement he grants a procuratory for reſigning his whole eſtate, ſo particularly, for reſigning the lands of *Drummuckloch* and *Breiſtmiln*, formerly conveyed to Captain *John Dalrymple* by the two diſpoſitions before mentioned, in favours of *John Dalrymple* the defender, and the other heirs therein named; and Mr. *Dalrymple* was thereupon duly infeft. The Earl died in the following year 1748.

In the year 1749, the Earl of *Selkirk* brought an action of conſtitution againſt *William* Earl of *Dumfries* and *James* Earl of *Stair*, as lawfully charged to enter heirs of conqueſt and of line to the ſaid deceas'd Captain *John Dalrymple* their brother, for payment of the foreſaid bond for *L.* 1600 *Sterling*. And the defenders having renounced; Decreet *cognitionis cauſa*, went againſt the Captain's *hæreditas jacens*; and thereupon the Earl of *Selkirk*, in *February* 1750, obtained a decreet of adjudication *cognitionis cauſa*, adjudging the lands of *Drummuckloch* and *Breiſtmiln*, as belonging to the deceas'd Captain *John Dalrymple*.

Upon this adjudication the Earl of *Selkirk* brought an action of maills and duties againſt *John Dalrymple* of *Stair*, and the tenants of theſe lands.

Compearance was made for Mr. *Dalrymple* of *Stair* the defender, who *objected* to the Earl of *Selkirk*'s title; That the adjudication was erroneouſly led, in ſo far as it proceeded upon a charge to enter heir, againſt the Earl of *Dumfries*, and the preſent Earl of *Stair*: whereas, by both the diſpoſitions, the deſtination of the lands is to the ſame heirs, who were called by the ſettlement or tailzie made in the 1739; by which neither the Earl of *Dumfries* nor the Earl of *Stair* were at all called, but Mr. *Dalrymple* the defender, who is the neareſt heir now on life that was called in that tailzie; and conſequently the perſon who ought to have been charged: That as theſe lands were not deſcendible to Captain *Dalrymple*'s heir of conqueſt, or heir of line, but by the inveſtitures of the eſtate, to the defender his heir of tailzie, it is undeniable, that the Earl of *Dumfries*, by entering heir of conqueſt to the Captain, or the Earl of *Stair*, by entering heir of line to him, could not have taken the lands in queſtion, which were deviſed to his heirs of tailzie; and conſequently that they could not be carried by this adjudication. An adjudication *cognitionis cauſa* goes againſt the defunct's eſtate, deſcending to the heir renouncing, in the ſame manner as it would have been competent to have adjudged the lands from the heir renouncing, if he had entered: and this very adjudication adjudges theſe lands and the rights thereof, " which might have been competent to the " Earls of *Dumfries* and *Stair*, if they had entered heirs reſpectively to " their brother, and not renounced;" and therefore can never carry theſe lands, which were not deſcendible to the Earls of *Dumfries* and *Stair*, who were not the Captain's apparent heirs therein, and to whom no right

right was competent, ſuppoſing they had not renounced, *Stair*, *lib.* 3. *tit.* 2. § 46.

*Anſwered* for the purſuer: 1*mo*, That as the property of theſe lands were, by the charters and infeftments before mentioned, veſted in the purſuer's debtor, it was no doubt competent to his creditors to adjudge the ſame for payment of their debts; and, if no other deſtination appeared by the inveſtiture, the only heirs from whom they could adjudge were the heirs at law, *viz.* the heir of line and the heir of conqueſt, who, by the law, were intitled to every heritable ſubject belonging to the defunct, where no other particular heirs appeared from the inveſtitures to exclude them.

2*do*, Tho' in the diſpoſitions of the above lands, granted by the Earl of *Stair* to his nephew, there is a ſubſtitution, failing heirs-male of his body, to the other heirs of entail contained in a bond of tailzie of his eſtate, dated 21ſt *May* 1739; yet, as no infeftment was ever taken upon that tailzie, ſo as it could be a title of poſſeſſion of any lands whatſoever, it could not be incumbent on Captain *Dalrymple*'s creditors to ſearch after a perſonal deed, and go thro' a courſe of proceſſes, exhibitions, *&c.* to recover it, before they could adjudge their debtor's eſtate. They were intitled to adjudge the ſame from his heirs at law, when there appeared no other deſtination in favour of any particular heir that could be known, either from the inveſtiture of the defunct's lands to be adjudged, or from the inveſtiture of any other eſtate whatſoever that could be found upon record.

3*tio*, The defender can have no intereſt to propone this objection, which will only ſerve to put the purſuer to the trouble of bringing a new proceſs againſt him, upon the paſſive titles, to which his preſent allegation would ſubject him.

Was he to accept of the ſucceſſion, in virtue of the deſtination to him as heir of tailzie, called by the deed 1739, he behoved to pay the debts due by his couſin Captain *Dalrymple*: nay, his poſſeſſion of the lands in queſtion is an univerſal paſſive title, which muſt ſubject him to all his couſin's debts, in the preciſe terms of the ſtatute 1695, if he is to be held the neareſt apparent heir of theſe lands, in terms of the inveſtitures.

" The Lords ſuſtained the objection to the purſuer's title, that the per-
" ſons charged to enter heir were not the heirs of inveſtiture." B.

*Act. Ferguſon.* *Alt. G. Brown.*

N° CXCVII. 9th *March* 1756.

*JOHN FORBES* Eſq; eldeſt Son of *Alexander* late Lord *Pitſligo*,

againſt

His Majeſty's ADVOCATE.

*ALEXANDER* late Lord *Pitſligo* was attainted for his acceſſion to the Rebellion 1745; his eſtate was ſurveyed by the Barons of Exchequer as forfeited to the Crown.

*John Forbes*, the late Lord's eldeſt ſon, entered a claim upon the eſtate for a certain ſum of money due to him by two adjudications of the eſtate of *Pitſligo*, obtained in 1690 and 1695, to which adjudications the claim-

ant's grand-mother, Lady *Sophia Erſkine*, when Lady Dowager of *Pitſligo*, came to have right; and in 1716 and 1717 diſponed them to the claimant, who was then an infant of two or three years old.

The conveyances of the adjudications by Lady *Pitſligo* to the claimant contain the following clauſe: " That how ſoon and whenſoever it ſhall " happen *Alexander*, Lord *Pitſligo*, my ſon, to be in a condition, ca- " pacity and ability lawfully to purchaſe acquire and redeem a right to the " ſaid adjudication, in his own perſon, from the ſaid *John* Maſter of *Pit-* " *ſligo*, and his foreſaids, it ſhall be lawful and leiſom to him, perſonally, " to purchaſe and redeem the right of the haill premiſes from his ſaid " ſon, and his foreſaids, upon payment of a Roſe Noble, upon any *Whit-* " *ſunday* or *Martinmaſs* after his ſaid capacity and ability, upon forty days " premonition, *&c.*"

The reaſon of Lady *Pitſligo*'s conveying the adjudications to her grand-ſon, under the proviſion above mentioned, was, that her ſon *Alexander* Lord *Pitſligo*, had been concerned in the Rebellion 1715, and tho' not attainted, yet, at the date of the conveyances, was liable to be proſecuted and attainted, as the three years from the commiſſion of the treaſon had not then run.

The claimant admitted, that he had never heard of theſe adjudications, nor the conveyances thereof in his favour, until the year 1748, when a Gentleman told him, that they had been ſent to him from the houſe of *Pitſligo*, after the Rebellion 1745.

His Majeſty's Advocate *objected* againſt the claim, *Firſt*, That ſo ſoon as *Alexander* Lord *Pitſligo*, by the lapſe of three years from the Rebellion 1715, came to be in a capacity and ability to acquire the adjudications, there remained no more with his ſon the claimant than a nominal fee, defeaſable by Lord *Pitſligo* at pleaſure, and that the real and ſubſtantial right was in Lord *Pitſligo*; and therefore was forfeited by his attainder, in the ſame way as when a father diſpones his eſtate to his ſon, reſerving his own liferent and a power to burthen or alter, *&c.* ſuch nominal fee in the ſon, does not protect the eſtate from being forfeited by the father's rebellion, as was found in the caſe of *Lovat*; and that the objection was ſtrengthened in the preſent caſe from the adjudications and conveyances not being delivered to the claimant, but to his father.

2*dly*, That ſuppoſing the conveyances of the adjudications to the claimant to be valid and unexceptionable, yet the condition or power of redemption for a Roſe Noble, conceived in favour of Lord *Pitſligo*, was forfeited and belonged to the Crown by his attainder; for by Statute 33. *H.* 8. *cap.* 20. it is enacted, " That, if any perſon ſhall be attainted of high treaſon, " by the courſe of the common law, or ſtatutes of this realm, every ſuch " attainder ſhall be of as good ſtrength and effect as if it had been done by " authority of Parliament; and that the King ſhall have as much benefit " and advantage by ſuch attainder, as well of uſes, rights, entries, *condi-* " *tions*, as poſſeſſions, reverſions, remainders, and all other things, as if it " had been done by authority of Parliament." That altho' in ſome caſes, decided in the Courts in *England*, it had been found, that ſome conditions did not forfeit; yet it was only in caſes where the conditions were conceived abſolutely perſonal to the party, ſo as not to be performable by any other. But *Hales*, *vol.* i. *p.* 244. obſerves, " If the condition be ſuch, that " the ſubſtance of the performance thereof is not bound up ſtrictly to the " perſon attainted, then ſuch a condition is given to the Crown:" for which

which he cites *Englefield*'s caſe. That the preſent condition or right of reverſion was not, by the law of *Scotland*, perſonal, but was deſcendible to Lord *Pitſligo*'s heirs, had they been different from the fiar, was aſſignable by Lord *Pitſligo*, and might have been affected by his creditors by adjudication; and therefore went to the Crown by forfeiture.

3*dly*, It was *objected*: That ſuppoſing the claim for the ſums contained in the adjudications to be good, yet no annualrent could be due thereon, ſince the adjudications came in the perſon of the claimant; becauſe, as he had been alimented and educated by his father, who was the debtor in theſe adjudications, and much more beſtowed upon him than the annualrent of theſe ſums, the aliment behoved to be conſidered as payment of the annualrents; for *debitor non praeſumitur donare*.

4*thly*, It was *objected*: That, at any rate, the claimant could only demand the principal ſums in the adjudications, and the intereſt of ſuch principal ſums, but not the accumulated ſums and intereſt upon them; becauſe theſe accumulations were penal, and all penalties are diſallowed by the veſting act.

It was *anſwered* for the claimant, to the *firſt* objection: That the conveyances of the adjudications by the Lady Dowager of *Pitſligo* were intended to veſt a real fee in the claimant, and the heirs of tailzie ſubſtituted to him; and, if her ſon the late Lord *Pitſligo* had died without exerciſing the faculty of redemption, it appears evident, that the claimant could have infeft himſelf upon the adjudications conveyed to him, and brought every action competent upon them againſt the eſtate of *Pitſligo*, without repreſenting his father; and therefore there is no colour to compare theſe conveyances to the caſe of the tailzie of *Lovat*; for in that caſe, the eſtate was originally veſted in Lord *Lovat* the attainted perſon, and the claim was founded upon the tailzie executed by him a ſhort time before the Rebellion, with a view to elude the forfeiture, which tailzie reſerved ſuch general powers as left him at liberty to do what he would with the eſtate; and therefore the tailzie was conſtructed to be an eluſory deed, intended to avoid the forfeiture, without denuding the granter who was the forfeiting perſon.

But, in the preſent caſe, the adjudications never were in the perſon of the late Lord *Pitſligo*; they belonged to his mother, who might have made them over to any perſon ſhe pleaſed. She gave them to the claimant under a proviſo, which, if it can now take place, may have effect; but if it cannot, the claimant's right is ſimple and abſolute; and whatever may be ſaid againſt deeds granted by a man to ſecure againſt a future forfeiture, that may be inflicted for his own crime; it is undoubtedly moſt lawful and allowable for a party who apprehends ſuch danger, with reſpect to a preſumptive heir, to ſecure his eſtate againſt it; and any powers reſerved in favour of ſuch heir will fall to be amply interpreted.

And with reſpect to the delivery of the deeds, there is no reaſon to ſuſpect that they were ever delivered to the late Lord *Pitſligo*, who was out of the country at the time when they were executed: but it is not material to whom they were delivered; becauſe their being out of the granter's hands was a ſufficient delivery, and the claimant was intitled to inſiſt for exhibition of them from any perſon in whoſe cuſtody they were.

To the *ſecond* objection, it was *anſwered*: That the queſtion falls to be determined by the law of *England*, which has always been careful not to extend forfeitures beyond the plain meaning of the ſtatutes enacted for

that

that purpoſe: it was not extended to *eſtates taill*, altho' excepted by no ſtatute, until an expreſs act was made for that purpoſe, *anno* 26. *Henry* VIII. Nor was it extended to rights held in truſt for the forfeiting perſon, until another ſtatute was made for that purpoſe in the 33d year of the ſame reign. And, even as the law now ſtands, rights of action to lands and tenements, writs of error, competent to heirs in remainder, and many other beneficial rights which might belong to the forfeiting perſon, do not fall under the forfeiture, as appears from the *Engliſh* Law-books, particularly, Lord *Coke's Inſtitutes*, *part* 3. *fol.* 19. and his *Reports*, *part* 3. N° 2. Sir *Francis More's Reports*, *p.* 25. and 125.

The ſtatute referred to by the reſpondent, for comprehending ſuch faculties as thoſe conceived in favour of the claimant's father, is the foreſaid act 33. *Henry* VIII. *cap.* 20. by which it is contended, that all conditions provided in favour of the attainted perſon fall under the forfeiture.

But, *Firſt*, The faculty conceived in favour of the claimant's father falls not under the deſcription of a condition by the law of *England*, which is deſcribed to be "a quality annexed to a real eſtate, by virtue of which it may be defeated, enlarged or created upon an uncertain event." And it is laid down as a general rule, "That conditions can only be reſerved to the "feoſer, donor or leaſor, and their heirs, and not to any ſtranger." *New Abridgment of the Law*, *vol.* i. *tit. Conditions*, *p.* 400, where reference is made to ſeveral authorities for proving that rule.

But, in the *next* place, even where ſuch faculties are reſerved to the granter, and therefore properly held to be conditions; yet it is an eſtabliſhed rule in the law of *England*, That where they are perſonally conceived in favour of the perſon afterwards attainted, they will not tranſmit to the Crown by his forfeiture; this was found in the caſe of the Duke of *Norfolk*, who, *anno* 18. *Eliz.* conveyed his lands to the uſe of himſelf for life, his eldeſt ſon in taill, with divers remainders over, under a proviſo, "that "if he ſhould be minded to alter and revoke the ſaid uſes, and ſhould ſig- "nify his mind in writing, under his proper hand and ſeal, ſubſcribed by "three witneſſes, that then the uſes ſhould be revoked." This judgment is referred to by Lord *Coke*, in his *Reports*, *part* 7. N° 13.

The like judgment was given in the caſe of *Harden* verſus *Warren*, *anno* 2. *Car.* I. reported by *Latch*, *p.* 25. 69. and 102. Sir *William Shelly* had made a feofment to the uſe of himſelf for life, remainder to his firſt, ſecond, or other ſons, in taill, provided that if Sir *William*, during his life, tender a ring or a pair of gloves to any of the feoffees, or their heirs, *ipſo Gulielmo tunc declarante et expreſſante* that the tender was to the intent to avoid the deed, that then the uſes ſhould be void, and the feoffee ſhould ſtand ſeized to the uſe of Sir *William* and his heirs. Sir *William* was afterwards attainted for high treaſon; and it was adjudged, both by the Court of Exchequer and Court of Common Pleas, that the power of revoking the uſes was not tranſmitted to the Crown by the forfeiture.

And the like judgment was given in the caſe *Smith* verſus *Wheeler*, adjudged firſt by the Court of Common pleas, and thereafter in the Court of King's Bench, 23. *Car.* II. obſerved by Sir *Matthew Hale*, *vol.* i. *p.* 246. And accordingly Sir *Matthew Hale*, *vol.* i. *p.* 245. lays down this general rule, as proved by the above three precedents, which he there recites, *viz.* That if the condition be appropriated and applied to the perſon of the party attainted, then ſuch condition is not given to the Crown.

And,

And, if in the above mentioned caſes, the faculties conceived in favour of the forfeiting perſon did not tranſmit to the Crown, much leſs can they in the preſent caſe; for that in the above caſes the faculties were created by the forfeiting perſons themſelves: but, in the preſent caſe, they were created by a third party, who was guilty of no crime, and had full power over the eſtate tranſmitted by the conveyance in favour of the claimant. And even altho' the faculty were conſtrued to be a condition, yet it could not poſſibly fall to the Crown; becauſe it is a condition which is not given to the party when he falls under an incapacity.

The judgment mentioned by the reſpondent to have been given in the caſe of *Englefield* was never approved of. Lord *Coke*, who mentions it in his *Reports*, *part* 7. N° 12. obſerves, that the Council of *Englefield* were not ſatisfied with the judgment, and adviſed to bring a writ of error; but the next ſeſſion of Parliament, *anno* 35. *Eliz.* paſſed an act eſtabliſhing the forfeiture in favour of the Queen; and, when the like queſtion occurred in the caſes of *Harden* and *Smith*, the judgment in *Englefield*'s caſe was not regarded, but the precedent in the caſe of the Duke of *Norfolk* followed, as more agreeable to the law of *England*.

It is needleſs to inquire, whether the faculty conceived in favour of the late Lord *Pitſligo*, could, by the law of *Scotland*, have been aſſigned by him, or tranſmitted to his heirs, or affected by his creditors; for it is the law of *England* which muſt determine what rights are forfeitable. It has been found, that rights conceived in the moſt ſtrict and unalienable form that the law of *Scotland* can deviſe, are liable to forfeiture, becauſe they were ſo by the law of *England*: and, *è converſo*, it muſt be equally certain, that rights of action, and many others which, by the law of *Scotland*, may be tranſmitted to aſſignies either voluntary or legal, are, notwithſtanding thereof, not ſubject to forfeiture, becauſe not ſo by the law of *England*; for by that law there is no occaſion, in the caſe of forfeitures, to inquire how far the rights are tranſmiſſible to heirs, aſſignies or creditors, but only to conſider how far the forfeiture is enacted by ſtatute, as it can go no further than ſtatutes have carried it, or the conſtructions put upon them in former precedents. At the ſame time, it may juſtly be doubted, if the faculty conceived in favour of the late Lord *Pitſligo* could have been aſſigned by him, or tranſmitted to his heirs or creditors; becauſe the faculty was conceived perſonally in favour of himſelf only; and it is certain, that reverſions do not go to heirs and aſſignies, unleſs it be ſo expreſſed.

To the *third* objection againſt the annualrents which were claimed upon the principal ſums contained in theſe adjudications, it was *anſwered:* That the aliment furniſhed to the claimant could not compenſate or extinguiſh the annualrents; becauſe the brocard, that *debitor non præſumitur donare*, cannot apply to the caſe where the perſon who furniſhed the aliment was under a natural obligation to aliment the other party, as was found by the Lords in 1731, in the caſe of Lord *Kimmergham*'s daughter againſt his creditors, where her claim for the annualrents of *L.* 8000 *Scots*, which had been aſſigned to her by a relation, and affected her father's eſtate, was not extinguiſhed or leſſened by the aliment which her father had furniſhed to her.

To the *laſt* objection, it was *anſwered:* That the accumulation of the annualrent due at the date of the adjudications into a principal ſum, ſo as to bear annualrent thereafter, was not penal, but was moſt equitable; becauſe,

ſeeing the creditor did not make payment of theſe annualrents, it was reaſonable that they ſhould be conſidered as a principal ſum, ſo as to bear annualrent from the date of the adjudication, as was lately found in the caſe of Sir *Lewis M'Kenzie* claimant upon the eſtate of *Cromarty*.

" The Lords repelled the objections founded upon the clauſes contained " in the conveyances of the adjudications granted by the Lady Dowa- " ger of *Pitſligo*, in favour of her grandſon the claimant, in reſpect it " was not alledged, or offered to be proved, that the late Lord *Pitſli-* " *go* executed theſe perſonal faculties; and found, That there could " be no deduction from the ſums in the adjudication, on account of " the aliment furniſhed to the claimant by his father; and ſuſtained " the claim for the principal ſum and intereſt of the bonds accumu- " lated into one ſum without penalties, at the date of the reſpective " adjudications, and for the intereſt of the ſums ſo accumulated." B.

Act. *Ferguſon.* Alt. *King's Council.* Reporter, *Kaims.*

N° CXCVIII. 9th *March* 1756.

## *ARCHIBALD STEVENSON* of *Montgreenan*

againſt

## *WILLIAM BARCLAY* Tenant in *Woodgreen.*

*ARCHIBALD STEVENSON* purſued *William Barclay* before the Juſtices of Peace, for having ſuffered five of his cattle to break into the purſuer's incloſure, and deſtroy ſome young trees. The Juſtices decerned againſt the defender for *L.* 25 *Scots* to be paid to the purſuer, and for the like ſum to be paid to the Clerk of Court, in terms of the 39th act of Parliament 1685.

*Archibald Stevenſon* applied for a bill of horning upon the decreet pronounced by the Juſtices. The Lord Ordinary doubted if a bill of horning was competent upon a decreet pronounced by the Juſtices of Peace; and therefore reported the caſe to the Lords.

" The Lords refuſed the bill." B.

N° CXCIX. 9th *March* 1756.

## Mrs. *JEAN HAY* and her Children

againſt

## His Majeſty's ADVOCATE.

IN the year 1683, *Cuthbert* of *Caſtlehill* obtained decreet adjudging to him the eſtate of *Lovat* for the accumulated ſum of 15840 merks.

Mrs. *Jean Hay* and her children, in right of the adjudger, entered their claim upon the forfeited eſtate of *Lovat*, to the extent of the adjudication aforeſaid.

To

To this claim his Majeſty's Advocate *objected* the negative preſcription.

*Pleaded* for the Claimants: The courſe of the negative preſcription has been interrupted; for that, in the year 1706, *M'kenzie* of *Preſtonhall* entered into poſſeſſion of the whole eſtate of *Lovat*, in virtue of a charter of adjudication and infeftment on it: and, in the year 1708, he brought a proceſs of reduction and improbation againſt the other creditors on the eſtate of *Lovat*, and particularly againſt *Caſtlehill:* That in this proceſs *Caſtlehill* produced his grounds of debt: great *aviſandum* was made with them; and they were ſpecially excepted in a decreet of certification pronounced *contra non producta*. From this ſtate of the fact, the claimants *contended*, That the negative preſcription could not be objected to their claim: That he cannot be ſaid to loſe his right *non utendo*, who, before the years of preſcription have run, produces it in judgment; *Caſtlehill*, by this production, *took document* upon his obligation, in terms of the act 1469, and *followed* it in terms of the act 1474. Neither can the term *purſue*, which is uſed in the act 1617, afford any argument againſt this claim: that term muſt be explained by the terms uſed in the former acts; and thus the negative preſcription has been found interrupted by a charge of horning, which yet is *no purſuit*, 21ſt *July* 1629, *Morris* againſt *Barclay*; by an informal execution of citation, 6th *July* 1671, *M'Crae* againſt Lord *M'Donald*, and by citation upon the firſt ſummons, altho' no judicial act followed, 17th *February* 1665, *Butler* againſt *Gray*.

*Pleaded* for his Majeſty's Advocate: The words uſed in the three ſtatutes denote, that, in order to prevent the negative preſcription, the creditor muſt uſe ſome judicial procedure, teſtifying to the debtor that he means to inſiſt in his right; to ſuch judicial proceedings all the deciſions produced for the claimants relate; but extraneous deeds of the creditor infer not any interruption of preſcription. Thus, an action of debt in general will not prevent the preſcription of a particular debt, 16th *February* 1699, *Menzies* againſt *Forbes*; nor letters of horning, altho' ſuſpended by the debtor; ſuch ſuſpenſion being *no document taken* by the creditor, 11th *December* 1717, *Wright* againſt *Wright*.

And thus the production made by *Caſtlehill* cannot be underſtood to interrupt the negative preſcription; for that he made it, not in order to obtain payment of his debt, but to prevent his titles being held as forged by a decreet of certification; and as this production was made, not againſt the debtor, but againſt an incumbrancer, it cannot operate againſt the debtor, nor againſt the Crown in right of the debtor.

" The Lords repelled the objection made on the part of his Majeſty's " Advocate, and ſuſtained the claim." D.

Act. *Hay, Lockhart.* Alt. *M'Queen, King's Council.* Clerk, *Kirkpatrick.*

N° CC. 9th *March* 1756.

*WILLIAM CUMMING*, and others,

against

*ARCHIBALD HART* and others.

*ALEXANDER LAW* died ſuddenly and inſolvent: *Hart* a creditor, immediately upon his death, preferred a petition to the Commiſſaries of *Edinburgh*, ſetting forth, "That *Law* had died ſuddenly; that "he owed conſiderable ſums to *Hart* the petitioner; that there was reaſon "to ſuſpect that his effects might be embezzled, in defraud of him and "the other creditors; therefore praying warrant to ſequeſtrate and ſeal up "the defunct's effects, for the behoof of all concerned."

The Commiſſaries granted the deſire of this petition. The goods were inſpected, and the ware-houſe locked up by *Smith*, an officer of Court; next day *Smith* inventaried and valued the goods, and took cuſtody of the key.

A few days after this, the defunct's relict granted her obligation, with two cautioners, to *Hart* and the other defenders, that ſhe ſhould roup the effects which had been ſequeſtrated, and apply the price towards their payment; and this obligation, with an inventary of the goods, was delivered to *John Watſon* doer for the defenders. *Watſon* informed *Smith*, that the creditors had come to an agreement with the relict, and thereupon got the keys of the ware-houſe from him, and delivered them to the relict. She rouped the goods, and with the price paid off the defenders.

*Cumming*, and other creditors, not parties to this tranſaction, purſued *Hart* and others for payment of their debts, upon the paſſive title of vitious intromiſſion.

*Pleaded* for the defenders: Vitious intromiſſion is penal and odious; it may not be extended againſt thoſe who acted *bona fide* and openly; and the defenders did not ſecretly take poſſeſſion of their debtor's goods, but took payment from the relict of their juſt debt, being prevailed upon by her, to ſave her and her family the expence of confirmation, *&c.* as there would be a reverſion. The whole tranſaction with her was openly and fairly carried on, neither ſhe nor they imagining there was any other creditors, and the roup was publick. Altho' *Hart* applied for ſequeſtration, and obtained it for the behoof of all concerned, yet there was no obligation upon him to go further; he might honeſtly ſtop here, and take payment of his debt when offered; and the relict is the intromitter, not the defenders.

*Anſwered* for the purſuers: The whole was a fraudulent contrivance to hinder a confirmation, and prevent all the creditors from coming in *pari paſſu*. The defunct's bankruptcy was notorious, as is evident from the words of *Hart*'s application to the Commiſſaries. And if the effects had been fairly divided, there would have been a great deficiency; to prevent this, the name of the relict is uſed, as ſhe had nothing to loſe; but the defenders, and their doer *Watſon*, were the conductors of the whole; they by the

the tranſaction with her, authorized her intromiſſion, and by falſe repreſentations, obtained the poſſeſſion of the goods from *Smith*, thereby taking the goods out of the cuſtody of the Court; a ſtep highly irregular, as done both in contempt of the Court, and to defraud the purſuers.

The Court ſeemed to be of opinion, that there was no place for a paſſive title in this caſe; at the ſame time that the intromitting with the goods *ſine titulo*, after they were in the hands of the Commiſſaries, and thereby defeating the legal ſequeſtration, was highly irregular; as was likewiſe the taking ſuch obligation from the relict, and receiving payment from her, all within the ſix months: That they ought therefore to be ſubjected *in valorem*.

" The Lords found the defenders liable to the purſuers for the debts " purſued for, being within the value of their intromiſſions." W. S.

Act. *Lockhart.* Alt. *Advocatus,* *A. Pringle.* Clerk, *Kirkpatrick.*

N° CCI. 9th *March* 1756.

*WALTER RUDDIMAN* Printer in *Edinburgh,*

againſt

The GOVERNORS of the Merchant Maiden-hoſpital in *Edinburgh.*

UPON the 21ſt of *October* 1689, *Thomas Young* granted bond for 4000 merks to his mother *Alliſon Elliot*; this bond proceeds on a narrative of onerous cauſes.

*Ruddiman* acquired right by progreſs to this bond, and in the 1742 inſiſted in an action for payment againſt the hoſpital, who had ſucceeded to the eſtate of *Thomas Young*, in virtue of a gratuitous diſpoſition from one of of his repreſentatives.

Various defences offered for the hoſpital were repelled on the 25th of *June* and the 30th *July* 1746; it was now *objected* for the hoſpital, that it appeared by the regiſter of burials in *Edinburgh*, that *Thomas Young* was buried on the 25th of *October* 1689, being the fourth from the date of the bond; that therefore the bond muſt be preſumed *poſt tantum temporis* to have been granted on death-bed, unleſs the purſuer remove this preſumption, by proving that *Thomas Young* was in health when he granted the bond, or that he died ſuddenly, or of a violent death.

" The Lords found, that it is to be preſumed that the bond was granted " by *Thomas Young* on death-bed; and therefore that it cannot affect the " defenders, unleſs it is proved, that he was in *liege pouſtie* at granting " the ſame, or that the onerous cauſe of the bond be inſtructed. D.

Act. *Ferguſon.* Alt. *J. Craigie.* Reporter, *Juſtice Clerk.* Clerk, *Gibſon.*

N° CCII.

N° CCII. 11th *March* 1756.

## DUKE of *QUEENSBERRY*
against
## *TELFER.*

*TELFER* was tackſman of the Duke of *Queenſberry*'s lead mines at *Wanlockhead*. Upon expiry of the leaſe, the Duke obtained a decreet of removing againſt him. *Telfer* did by a formal inſtrument give over his poſſeſſion to the Duke's managers, who in his name acknowledged the acceptance thereof, in terms of the leaſe.

Some of the miners who had wrought under *Telfer* had themſelves built houſes at *Wanlockhead*, others had been put into poſſeſſion of houſes by *Telfer*, but none of them had paid any rent. They were all permitted to remain in poſſeſſion of their houſes for upwards of three months after the removal of *Telfer*; letters of horning were afterwards raiſed upon the decreet of removing above mentioned, and *Telfer* was charged to remove himſelf, his ſubtenants, ſervants, cottars, dependants, *&c.*

*Telfer* preferred a ſuſpenſion, and *pleaded:* That as his renunciation had been accepted, and as the miners did not poſſeſs under him, nor pay any rent to him, he could not be charged to remove them; it was alſo contended on the part of the miners, That they could not be ejected in virtue of this decreet of removing obtained againſt *Telfer*. It is not the practice at *Wanlockhead*, or at any other mines, to turn miners out of their houſes *brevi manu*. A formal warning forty days before *Whitſunday* is neceſſary, and has been frequently uſed. Moſt of the miners had themſelves built the houſes, and ſo far conſider them as their own property, as to be in the practice of ſelling them to one another. And altho' they may be obliged to quit them upon being paid the expences of building, yet they cannot be ejected ſummarily and without legal warning.

*Pleaded* for the Duke: The miners are neither cottars nor ſub-tenants, but they are ſervants who pay no rent to the maſter, and are removeable at his will; and although ſome of them have, by permiſſion, themſelves built the houſes in which they reſide, yet, upon ſatisfaction being made to them for their expences, they may be removed without any formal warning. At the ſame time the Duke agreed to paſs from all perſonal diligence againſt *Telfer*.

It occurred to the Court, That no formal warning forty days before *Whitſunday* was neceſſary for removing the miners, who were not properly tenants paying rent, but ſervants or labourers; at the ſame time it might bear hard upon theſe poor people to turn them out ſummarily without any premonition; and therefore,

" The Lords found, That there is no neceſſity of a legal warning to re-
" move the miners, artificers and labourers about the works; but that
" it is competent to the Duke of *Queenſberry*, or his tackſman, to re-
" move them upon a previous intimation of fifteen free days, made
" perſonally, or at their dwelling-places; and in caſe of their not ob-
" tempering the ſame, grant warrant to the Sheriff-depute to remove

" and

" and eject them, reſerving to ſuch of the miners and others who
" have built or repaired their houſes upon their own expences after-
" wards to inſiſt againſt the proprietor or tackſman for any claim com-
" petent to them as accords." W. S.

Act. *M^c Intoſh.* Alt. *W. Stewart.* Clerk, *Kirkpatrick.*

N° CCIII. 11th *March* 1756.

*ROBERT DALZIELL* Eſq;

againſt

*ALEXANDER DALZIELL* of *Glenae*, and *GEORGE HENDERSON.*

BY contract of marriage betwixt the late Earl of *Carnwath* and Mrs. *Margaret Vincent*, the father and mother of the purſuer, particular ſums belonging to the Lady were veſted in certain truſtees and the ſurvivors or ſurvivor of them, and the heirs and aſſignies of the laſt ſurvivor, for the uſes mentioned in the contract, *viz.* that they ſhould in part be applied towards purchaſing, for the behoof of the children of the marriage, an heritable bond, which had been granted by the Earl, to *Stewart* of *Shambelly* for 2500 *Sterling*, and the remainder towards paying the Earl's perſonal debts; who therefore obliged himſelf, his heirs and ſucceſſors, to grant heritable bond to the truſtees for the behoof of the children of the marriage, for ſuch remainder ſo laid out.

*Stewart* of *Shambelly*'s debt was accordingly paid off, and a conveyance of his heritable bond taken to the truſtees, for the behoof of the children, and the remainder of the ſums veſted in the truſtees was applied, in terms of the contract, towards paying of the perſonal debts of the Earl; but he dying without giving any ſecurity, *Alexander Dalziell* of *Glenae*, his eldeſt ſon by a former marriage, granted his heritable bond for the ſums laſt mentioned, and upon both thoſe heritable bonds the truſtees were duly infeft.

The truſtees being now all dead, and *Henderſon* of *Broadholm* the laſt ſurvivor, having left an only ſon *George* an infant, incapable of performing the truſt, *Robert Dalziell*, the only child of the marriage, thus circumſtanced, brought a proceſs againſt *Dalziell* of *Glenae* and *George Henderſon*, in order that the ſubjects contained in the truſt-right, might be veſted in his own perſon: And the queſtion in this caſe was, How the feudal-right veſted in the truſtees by their infeftment, could be tranſmitted to *Robert Dalziell*, as *George Henderſon* did not chuſe to repreſent his father, the laſt ſurviving truſtee, or to make up titles to theſe ſubjects, ſo as to convey them in the ordinary form, leſt he ſhould thereby incur a paſſive title.

Various opinions were offered: ſome thought that a charge againſt *George Henderſon* was neceſſary, and, upon his renouncing, a decreet *cognitionis cauſa* in common form; others judged that a ſimple declarator was ſufficient to put in the new name into the infeftment, in the ſame manner as a declarator of redemption is ſufficient to veſt a wadſet, as being but a temporary right. Others again, not ſatisfied with this laſt opinion, and judging a

ſimple declarator not ſufficient to convey, tho' ſufficient to extinguiſh a feudal right, propoſed, that where the feudal right held of the King, an order ſhould be granted to Chancery, to iſſue out a precept to infeft, or where, as in this caſe, the holding is of a ſubject, that letters of horning ſhould be granted as in appriſings. At laſt it was ſuggeſted, That the Court ſhould declare, that *Henderſon* held only in truſt; that that truſt was now at an end; and that they ſhould ordain *Dalziell* of *Glenae* the ſuperior to grant charters with precepts for infefting the purſuer *Robert Dalziell*. This method, as the eaſieſt and leaſt expenſive, was unanimouſly agreed to, and declared to be the rule in all caſes of the like nature in time coming. The judgment was expreſſed in the following terms.

" The Lords found, That the two debts libelled, and the infeftments " thereon, were veſted in the truſtees, for the behoof of the iſſue of the " marriage between the purſuer's father and mother; and found that " the purſuer was the only iſſue of the ſaid marriage; and found that " *John Henderſon* younger of *Broadholm* was the ſurviving truſtee; and " that the truſt was veſted in him deſcendible to the defender his only " ſon; and found that *George Henderſon* the defender, ought to be de- " nuded of the ſaid truſt in favour of the purſuer. And they declared " the truſt-ſubject to belong to the purſuer, and decerned accordingly; " and in order that the ſaid infeftments and other ſecurities may be " legally veſted in the perſon of the ſaid purſuer, they decerned and " ordained *Alexander Dalziell* of *Glenae* the other defender, ſuperior of " the foreſaid infeftments, to grant to the ſaid purſuer proper charters " containing precepts of ſaſine for infefting the purſuer accord- " ingly." W. S.

Petitioner, *Wight*.

N° CCIV. 16th *June* 1756.

## *JOHN M'KINNON*

againſt

## *CHARLES M'KINNON.*

*NEILL M'KINNON* had, in the year 1731, diſponed the eſtate of *M'Kinnon*, to *John M'Kinnon* younger, and the heirs-male of his body; whom failing, to the heirs-male to be procreated of the body of *John M'Kinnon* elder; whom failing, to *John M'Kinnon* tackſman of *Meſſiniſh*.

A few years after, *John M'Kinnon* younger died, but without heirs-male of his body; and at that time there were no heirs-male of the body of *John M'Kinnon* elder; for which reaſon *John M'Kinnon* tackſman of *Meſſiniſh*, ſerved himſelf heir to *John M'Kinnon* younger, and took up the eſtate.

After this, in the year 1753, *John M'Kinnon* elder had a ſon named *Charles*.

The tutors of *Charles* brought an action againſt *John* tackſman of *Meſſiniſh*, to denude of the eſtate in favour of *Charles*.

*Pleaded*

*Pleaded* for *John* of *Meſſiniſh*: Ever ſince the deciſion Lord *Mountſtewart* againſt Sir *James M'Kenzie* 2d *January* 1708, it had been a point fixed in the law of *Scotland*, That the neareſt heir to the deceas'd at the time, might ſerve heir to him, notwithſtanding the poſſibility of a nearer one; and in conſequence of that, it follows, that as the entering heir is a *modus acquirendi dominii*, it muſt be perpetual in its effects, and no contingency happening afterwards will overturn it.

*Anſwered* for *Charles*: By the diſpoſition, the eſtate was plainly to be in the heir-male of the body of *John* the elder, upon the failure of heirs-male of the body of *John* the younger; but as, when this laſt event happened, the law, to avoid the inconveniency of leaving the fee *in pendenti*, had allowed it to be veſted in the neareſt heir for the time; ſo, when a nearer, the true heir, appeared, the inconveniency of leaving the fee *in pendenti* ceaſed, and the original diſpoſition was enabled to have its effect. *Vid.* deciſion 13th *December* 1707, *George M'kenzie* againſt Lord *Mountſtewart*, and *Cahown* againſt *Wier*, cited in *Stair*'s deciſions, *v.* 2. *p.* 514, and *Inſt.* p. 477.

"The Lords found, That the purſuer has right to the eſtate of *M'kinnon*, from the time of his birth; and that the defender is obliged to denude thereof in his favour."

J. D.

Act. *Ferguſon.* Alt. *Lockhart.* Reporter, *Juſtice Clerk.*

N° CCV. 17th *July* 1756.

## *MARY URE*

againſt

The Earl of *CRAWFURD*, and *HUGH CRAWFURD.*

*JAMES URE* received a diſpoſition of the eſtate of *Shirgartoun*, in which a certain line of ſubſtitutes was ſettled, and he granted, of the ſame date, a ſeparate obligation, whereby he bound himſelf not to ſell nor contract debt, nor to do any other deed whereby the lands of *Shirgartoun* may be any ways affected.

He afterwards diſponed theſe lands gratuitouſly to the Earl of *Crawfurd* and *Hugh Crawfurd*; a reduction of this diſpoſition, as granted in contravention of the above prohibitory clauſe, being brought by his heir after his death.

It was *pleaded* for theEarl and *Hugh Crawfurd*: That the favour of property being great, and the interpretation of reſtraints upon property being limited to the very words of the reſtraint; and it having by many deciſions, been found, that a prohibition to alter the courſe of ſucceſſion, or do any other deed whereby the lands might be affected, did not imply a prohibition to ſell: it ought here to be found, *vice verſa*, that a prohibition to ſell, or do any other deed whereby the lands might be affected, did not imply a prohibition to alter the courſe of ſucceſſion; ſince thoſe deciſions proceeded on this ground, that the diſponer had not been by expreſs words prohibited

hibited to ſell; the preſent deciſion ought to go on this ground, that the diſponer was not by expreſs words prohibited to alter the courſe of ſucceſſion.

" The Lord's reduced the diſpoſition to the defenders." J. D.

Act. *Elliot, Williamſon, And. Pringle.* Alt. *J. Dalrymple, Brown, Lockhart.*

N° CCVI. 20th *June* 1756.

## *DAVID KINLOCH*

againſt

## *DAVID ROBERTSON.*

*DAVID KINLOCH* had a houſe in *Kinloch*'s cloſs, betwixt which and the houſe adjoining to it there was a common gavel: the ſecond floor of this laſt houſe was vaulted, and was uſed by *Robertſon* a blackſmith as a working ſhop: there were in this ſhop five forges and twenty workmen, who worked in it twelve hours in the day.

*David Kinlock* purſued *Robertſon* to remove his working ſhop, as the ſituation of it, in ſo public a place of the town, to the diſturbance, and even danger of the neighbours, was contrary to the public police of the burgh.

" The Lords decerned *Robertſon* to remove." J. D.

Act. *J. Dalrymple.* *Lockhart.* Alt. *M'Queen.* *A. Pringle.*

N° CCVII. 24th *June* 1756.

## CHILDREN of Sir *SAMUELL M'CLELLAN*

againſt

## The REPRESENTATIVES of Captain *MENZIES* of *Enoch.*

IN the year 1708, *James Menzies* of *Enoch* granted bond for *L.* 500 *Sterling* to Sir *Samuel M'Clellan*, payable at the next term.

In the year 1709, Sir *Samuel* aſſigned the above bond to certain truſtees, for the uſe and behoof of his children, according to ſuch diviſions and proportions as the ſaid truſtees ſhould think fit; which truſtees, he, in the ſame deed, appointed to be tutors and curators to his children, and declared them not to be liable for omiſſions.

Soon after he died, leaving his children under age; ſome of the truſtees tutors entered upon their office, but neglected the affairs of the children; ſo that nothing was done upon the bond for 43 years and a half, nor did the truſtees make any diviſion among the children.

After

After theſe 43 and a half years, the children brought a proceſs againſt the repreſentatives of *James Menzies* for payment of the bond. The defence was preſcription; and the anſwer was, That the purſuers were minors more than ten of the 43 years and a half.

*Pleaded* for the defender: The right to the bond was veſted in the truſtees; they alone had the *jus exigendi:* in ſuch a caſe, thoſe for whoſe behoof a truſt is taken, are no more than creditors to the truſtees to the extent of their debt. Preſcription runs againſt the truſtees, and the minority of the children cannot interrupt it.

2*do*, The children had no title to plead their intereſt as minors, as long as the diviſion was not made by the truſtees, and the truſtees were alive; ſeeing that, till the diviſion was made, the children could never be certain of having a ſhare or intereſt in the ſubject.

*Pleaded* for the children: Whatever may be the effect of a deed granted to truſtees *ex facie* abſolute, and qualified only by a ſeparate back-bond, the preſent deed merits a different conſideration, which *in gremio* bears to be granted for behoof of the children, in which the truſtees are appointed tutors for them, and were declared liable only for their omiſſions, and which therefore muſt be looked upon only as a more extenſive factory for the care of the children's affairs: in ſuch a caſe, the preſcription muſt be regulated by the ſtate and action of the children, and not by the action of the truſtees tutors.

" The Lords found that no action lay upon the bond in queſtion, " after the lapſe of 43 years and a half from the time of payment " thereof." J. D.

Act. *A. Pringle.* *M'Queen.* Alt. *Miller.* Clerk, *Kirkpatrick.*

N° CCVIII. 10th *July* 1756.

## *GEORGE MILLER*

againſt

*JOHN MELDRUM* and others, Tenants of *Balbedie.*

*SARAH* and *Margaret Schaws* being creditors of *Malcolm* of *Balbedie*, in *January* 1750, arreſted his rents in the hands of his tenants, and obtained decreet of forthcoming. The tenants afterwards paid theſe arreſted rents to their maſter; and, in 1754, were obliged to repay them to the arreſters.

*Miller*, another creditor, arreſted the rents 1751 and 1752, and inſiſted in an action of forthcoming.

*Pleaded* for the tenants: By the payment of the rents arreſted to their maſter, they became creditors to him, as they were obliged to pay the ſame rents again to the *Schaws*; therefore they had a right of retention of any ſubſequent rents affected by arreſtments poſterior to theſe payments to their maſter. That ſuppoſing they could not pay to their maſter arreſted rents, yet, by paying to him a ſum of money, they became creditors to him. Had it been any indifferent ſum, they had a right of retention; for a ten-

ant creditor has right to retain againſt all arreſters; it will make no difference that the ſum conſiſted in rents due.

*Anſwered* for the arreſters: The payment to the maſter after arreſtment was illegal, and cannot found the tenants in a claim of retention: a maſter cannot diſcharge future rents in defraud of all poſterior arreſtments; yet ſuch would be the caſe here, if the tenants plea were ſuſtained.

Further, the tenants did not become creditors to their maſter, till they were obliged to pay to the *Schaws*, which was in the 1754, and poſterior to the arreſtments uſed by the purſuers.

"The Lords found, That the tenants cannot have allowance of the pay-
"ments made to their maſters." W. S.

Act. *Scrymgeor.* Alt. *Da. Græme.* Clerk, *Pringle.*

N° CCIX. 24th *July* 1756.

The Duke of *ATHOLE*

againſt

The Ducheſs Dowager of *ATHOLE.*

THE late Duke of *Athole* became bound by marriage-contract to infeft the Ducheſs in the liferent of the lands of *Huntingtower*, with abſolute warrandice.

The teinds of *Huntingtower* belong to the Crown, and have been poſſeſſed under leaſe from it by the family of *Athole*; in conſideration whereof, there is paid a yearly rent, and a compoſition at the renewal of each leaſe. On the demiſe of the Duke, the Ducheſs entered to the poſſeſſion of her jointure-lands, and paid duly to the Crown the teind-duty aforeſaid.

The Duke of *Athole*, as tackſman of the teinds of *Huntingtower*, brought an action againſt the Ducheſs for payment of the full teinds ſince the time of her entry to her jointure-lands; and in ſupport of this action he *pleaded*, That if a third party were tackſman of the teinds he might exact them from the Ducheſs; nor would ſhe have recourſe againſt the purſuer, as repreſenting the late Duke his father, upon the warrandice in her marriage-contract, which contains no diſpoſition of teinds: and as the right to the teinds is diſtinct from the right to the lands, the Duke is, with reſpect to the teinds, in the ſame condition as any other tackſman would be: had the Duke made an abſolute ſale of the lands, he might ſtill have levied the teinds from the purchaſer, ſo alſo may he levy the teinds in this caſe where the lands are not diſponed abſolutely, but in liferent.

The Ducheſs Dowager *anſwered*, That, had ſhe apprehended that a demand for the full teinds would ever have been made, ſhe might have obtained a leaſe of them from the Crown, upon payment of that compoſition which the Duke paid; the tacks have been granted for the benefit of the proprietor, that is, of the Ducheſs during the ſubſiſtance of her liferent-right, and of the Duke at its expiry: the Duke muſt therefore communicate to the Ducheſs the benefit accruing from ſuch tacks, in the ſame manner

ner as he who procures a gift of his own ward muſt communicate the benefit thereof to his ſub-vaſſals.

" The Lords found the defender intitled to the benefit of the Duke's " tacks, but that ſhe muſt pay for her proportion of the compoſition " paid in Exchequer, and the expences of obtaining the ſaid tacks " correſponding to the rent of her liferent-lands included in the ſaid " tacks." D.

Act. *A. Pringle, Ferguſon.* Alt. Sir *Da. Dalrymple, Lockhart.* Reporter, *Woodhall.* Clerk, *Gibſon.*

N° CCX. 27th *July* 1756.

## *THOMAS HARVIE*

againſt

## *MATTHEW BOGLE*, and Kirk-Seſſion in *Glaſgow.*

ANTIENTLY there was but one kirk-ſeſſion in *Glaſgow*, upon the increaſe of inhabitants, this one kirk-ſeſſion was divided, in the year 1649, into ſeveral particular ones, according to the number of churches; after which the particular ſeſſions met ſometimes about their particular buſineſs, and when the intereſt of all was to be conſulted, they formed themſelves into one general kirk-ſeſſion upon the original plan. Theſe ſeſſions had one clerk choſen by the general kirk-ſeſſion: this clerk did both their particular and general buſineſs, for which he had emoluments to the amount of *L.* 50 yearly.

From the year 1606, till the year 1646, the clerk was choſen from year to year.

From the 1646, till the 1750, the elections of the office of clerk did not expreſs whether it was given for life or during pleaſure; neither did uſe, explain the duration of the office; for though in general, thoſe who got it enjoyed it while they lived, yet, on the other hand, in one inſtance, a clerk had been turned out for malverſation, and in another for incapacity ariſing from diſeaſe.

In the year 1750, Provoſt *Millar*, the then clerk, reſigned his office into the hands of the kirk-ſeſſion, on a condition of getting during his life *L.* 40 *Sterling* a-year from his ſucceſſor in office; and the kirk-ſeſſion choſe *Thomas Harvie* in his place, but without expreſſing whether the office was given during pleaſure, or for life.

A few years after, the kirk-ſeſſion, without aſſigning any reaſon in their act, removed Mr. *Harvie*, and elected *Matthew Bogle* into the office.

*Harvie* brought a reduction of this election againſt the kirk-ſeſſion and *Bogle*.

The defenders condeſcended upon ſeveral groſs neglects of *Harvie* in the exerciſe of his office, but did not alledge them till the proceſs was far advanced.

*Pleaded* for the purſuer: Publick expediency requires that offices of labour and truſt ſhould be for life; and therefore the legal preſumption is, that the office in queſtion is for life, unleſs that preſumption is taken off by a contrary uſage: but ſuch uſage cannot be ſhown here; for, on the contrary, ſince the 1647, thoſe who got the office have held it for life, particularly

particularly in the caſe of Provoſt *Millar*; the ſeſſion was not at liberty to elect without his reſignation, and the two exceptions of removing for malverſation and incapacity, aroſe from neceſſity, and do not contradict the general tenor of a contrary uſage.

*Anſwered* for the defenders: The clerkſhip in queſtion is only during pleaſure; it is an employment, not an office; it requires neither a particular education, nor particular abilities; the clerks to all the other kirk-ſeſſions in *Scotland* are during pleaſure. Provoſt *Millar*'s reſignation was an expedient thought of by his friends, when he grew old, to ſave the affront of a removal. Thoſe who enjoyed the clerkſhip in queſtion from the 1649, during their lives, held it by tolerance; for ſuch tenor was not expreſſed in their commiſſions; the removal of one of them on account of his incapacity from diſeaſe, is altogether inconſiſtent with the notion of a tenure for life.

The Lords took a middle courſe; they held the office to be neither for life nor abſolutely during pleaſure, but that the perſon poſſeſſed of it was removable, in terms of two deciſions, 18th *January* 1710, *Magiſtrates* of *Montroſe* againſt *Strachan*, and 10th *November* 1747, *John Foulis* againſt Veſtry of *Engliſh* Chapel, for reaſonable cauſes, without the neceſſity of a charge of direct malverſation; and that the neglects charged on the purſuer being reaſons *ex poſt facto*, aſſigned in the courſe of the proceſs, and not in the deed of *Bogle*'s election, were not proved *debito tempore*.

" The Lords ſuſtained the reaſons of reduction of the defender's electi-
" on, and declared *Thomas Harvie* clerk to the general and particular
" ſeſſions of the town of *Glaſgow*. J. D.

Act. *Elliot, Lockhart, Ferguſon.* Alt. *J. Dalrymple, Millar, A. Pringle.* Reporter, *Kaims.*

N° CCXI. 28th *July* 1756.

## *L E I T H* of *Freefield*
againſt
His Majeſty's ADVOCATE.

DURING the late Rebellion, *John Gordon* of *Glenbucket*, accompanied by other rebels, invaded the houſe of the purſuer, a loyal perſon, and plundered it, carrying away with him goods and effects to the value of *L.* 180. This happened poſterior to the 24th *June* 1745.

After the attainder of *Glenbucket*, the purſuer entered his claim in terms of the veſting act; and *pleaded*, That, had there been no forfeiture, his claim would have been unqueſtionably good againſt *Glenbucket* and his heirs, and therefore, as that act anxiouſly provides for the relief of all the lawful creditors of the forfeiting perſon, the purſuer's claim ought to be ſuſtained.

*Objected* for the Crown: That, in order to prevent fraudulent claims, and cut off debts that might be contracted for the very purpoſe of ſupporting the Rebellion, or ſaving the eſtates of rebels, the act aforeſaid veſts in his Majeſty all the rights and eſtates of forfeiting perſons from and after the 24th *June* 1745, allowing all their juſt and lawful debts, contracted by bonds

bonds and other ſecurities therein enumerated, previous to that date. From hence it is evident, that no debt, however juſt, contracted after that time by the Rebel, and by conſequence no deed, however available, to create a debt, can be ſuſtained to affect the eſtate veſted in the Crown.

" The Lords diſmiſſed the claim."

Act. *Garden.* Alt. *Advocatus et Solicitor.* Clerk,

N° CCXII. 29th *July* 1756.

## *M'DONALD*,

againſt

## A WIDOW of a PEER.

THE Widow of a Peer, being debtor to *M'Donald* in a certain ſum of money, due by bill, he raiſed and executed a horning againſt her, and afterwards applied for letters of caption.

The Lord Ordinary reported the bill to the Lords, who were of opinion, that the widow of a Peer was intitled to all the privileges of a Peer, and therefore,

" They refuſed the bill." B

N° CCXIII. 29th *July* 1756.

## *GEORGE CHALMERS*

againſt

## *MARY PEW.*

IN the year 1718, the Trinity Hoſpital granted a tack for three nineteen years of 90 acres of ground near *Leith* to *James Henderſon*. In the tack a power was reſerved to the Hoſpital to feu ſome acres of the farm. *Henderſon* conveyed this tack to *John Pew*.

In the year 1734, the Hoſpital granted a feu of 16 of theſe acres to *Thomas Mercer*, who built a houſe upon them; and ſoon after the Hoſpital granted him another feu of above 24 acres more to the ſouthward of the ſixteen.

Into the middle of theſe laſt 24 acres, there run from weſt to eaſt, a long narrow ſtrip of ground, of about three roods in extent. This ſtrip belonged to the Hoſpital, and was contained in the laſt feu; but, being at that time ſet in tack to *Shiells*, *Mercer* purchaſed from *Shiells* his tack of it.

*Mercer* likewiſe bought another long ſtrip of ground, of above two acres extent, from Lord *Balmerino*, which run from eaſt to weſt, along the ſouth-ſide of the 24 acres.

When the feus were granted to *Mercer*, *John Pew* had acquieſced in the firſt feu of the 16 acres, but brought a reduction of the 2d of 24.

During the dependence of this proceſs, *Mercer* had ſurrounded all the above purchaſes with a high ſtone wall, running in four ſtreight lines, and then cut it with a croſs-wall, running from eaſt to weſt, and thrown the whole into two fields. In the north part, in which his houſe ſtood, he included the ſixteen acres contained in his firſt feu, and three acres of the ſecond feu; and in the ſouth-field, he included the remaining 21 acres of the ſecond feu, together with the ſtrip bought from *Shiells*, and the ſtrip bought from Lord *Balmerino*.

In this proceſs *John Pew* prevailed, and *Mercer*'s ſecond feu was reduced.

*George Chalmers*, having acquired right to all *Mercer's* purchaſes, brought a proceſs of diviſion, againſt the heir of *John Pew*, in which he offered *Pew*'s heir, the two ſtrips in the ſouth-field, in return for the three acres in the north-field, which, by the proceſs of reduction, were now found to belong to *Pew*'s heirs: The Sheriff decerned in the diviſion.

The defender ſuſpended, and pleaded her defence in this manner. In antient times in *Scotland*, maſters were fond of having all their tenants near themſelves; the tenants likewiſe, for their own ſecurity, were fond of the ſame neighbourhood to each other; by which means the country was ſtocked, not with ſingle farm-houſes, as at preſent, but with ſmall villages: and agriculture being little known, as there was no difference betwixt the art of one man and that of another, ſo, for the moſt part, they all plowed the ſame field which was neareſt to the village, together; only, to diſtinguiſh the property of one from another, they, for the moſt part, plowed it in alternate ridges; one tenant plowing one ridge, or two ridges; another the next one or two ridges, and ſo on, which was called *run-rigg*. With regard to the grounds which lay further from the village, being from their diſtance, of leſs value, and not conſtantly in tillage, it became neceſſary to divide them among the tenants in larger parcels: Accordingly theſe, for the moſt paat, were poſſeſſed in the ſame way, not indeed in alternate ridges, but in alternate fields, one tenant poſſeſſing one field, another the next, and ſo on; which is called in ſome old deeds *Cutcherys*, and afterwards got the name of *Rundale*: With regard to grounds fartheſt off, again, theſe being moſt neglected, and fit only for paſture; and there being no incloſures in the country, they were poſſeſſed by all the tenants of the village, as a *common*.

Perhaps ſome ſuch method of poſſeſſion had ſubſiſted among our anceſtors, the antient *Germans*; for *Tacitus* relates of them, that they lived in villages, and plowed their fields in common; and perhaps they thought that what was poſſeſſed equally by all, would be defended by all equally, might give aid to the natural ſituation of mankind at the time, both among them and among us, requiring ſuch a ſpecies of poſſeſſion.

This method of poſſeſſing was tolerable, as long as, by the ſtrict feudal ſyſtem, lands were in ſome degree unalienable, and the ſame tenants remained with the ſame maſter; but when in latter times eſtates poſſeſſed in this manner came to be parcelled out among many purchaſers, it became quite inſufferable; and therefore many people, of themſelves, made diviſions more agreeable to the altered ſtate of the country; but ſtill many ſuch inconvenient mixtures of property remained; and therefore the legiſlature reſolved to apply their aid.

The inconvenience of *run-rigg* was the moſt ſtriking, and therefore a very violent, but neceſſary remedy was applied, to wit, the ſtatute 23. 1695 *anent run-ridge*, which broke throw the common rights of mankind

kind in their own property, and impowered the Sheriff to divide as was moſt convenient.

The inconvenience of *commmonties* got a remedy equally violent in form, but not ſo in effect; and, by the act 38th 1695, anent dividing of commonties, an opportunity was given for heritors in commonties, by forcing a diviſion of them, to convert an uſeleſs promiſcuous poſſeſſion, of a whole, into a determinate certain property in a part.

But as *Rundale* conſiſted of larger parcels of ground, and was more accomodated to the natural needs and wiſhes of mankind, ſo it does not appear that the legiſlature thought themſelves intitled to apply equally violent remedies to it: and therefore, tho' by the acts 41ſt 1661, and 17th 1669, they made proper regulations for it, in common with the other unmixed property of the kingdom; yet they no where impowered the Sheriffs to force a diviſion of it. If men were ſo fond of their ſmall properties in that way, as not to part with them on any terms, all that their neighbours could do, was, by the act 1661, to force them to be at the equal expence of a march-dyke; or, by the act 1669, to ſtreight marches: and as there was no law in neighbouring countries to force men to part with their property, it is probable that the legiſlature thought they had made ſtretch enough, in forcing men to divide their run-rig and commonties, without going any further.

Hence it follows, that the preſent diviſion cannot proceed on the 23d act 1694, for the ground propoſed to be exchanged lie not in alternate ridges; nor on the act 28th 1695, for they are not a commonty; nor on the act 1661 and 1669, for neither building dykes on marches, nor ſtreighting marches are ſought; nor on the common law, which allows not people to force an exchange of grounds with another, for the convenience of either.

II. The act 1695 on which alone, with any ſhow of reaſon, the diviſion can be ſought, relates to diviſions betwixt heritor and heritor, and not, as in the preſent caſe, to a diviſion betwixt heritor and tenant.

The act ordains, That, " where-ever the lands of different heritors ly " run-rigg, it ſhall be leiſom to either party to apply, *&c.* that the ſame " be divided according to their reſpective intereſt, and the judges are there- " by reſtricted, ſo as ſpecial regard may be had to the manſion-houſes of " the reſpective heritors, that there may be adjudged to them the reſpe- " ctive parts of the diviſion, as ſhall be moſt commodious to the reſpe- " ctive manſion-houſes and policy, and which ſhall not be applicable to " the other adjacent heritors." And it is declared, " That burrow-acres " ſhall remain with the heritors to whom they formerly belonged." Thus, it is the heritors who are to apply; it is the intereſt of the heritors that is to be conſidered, in making up of the diviſion, and the only exception is in favours of heritors.

Such being the two objections, founded on the letter of the ſtatutes, and particularly of the act 1695, judges cannot, in ſtatutes which limit the common uſe of property, go beyond the letter of the ſtatute, however great the obſtinacy of the one party, or the conveniency of the other may be.

*Anſwered:* That ſuppoſing the caſe in queſtion not to ly within the words of any of the ſtatutes referred to, yet it lies within the ſpirit of them, and particularly of the 23d act 1695; and it is the duty of judges to extend a law intended for the beauty and improvement of the country, againſt thoſe who would diſappoint that beauty, and that improvement.

The

" The Lords repelled the reaſons of ſuſpenſion, and found the letters orderly proceeded." I D

Act. *Lockhart, J. Dalrymple.* Alt. *Ferguſon, Millar, Johnſton.*

N° CCXIV. 31ſt *July* 1756.

## *THOMAS AITON*

againſt

## *JAMES MONNYPENNY.*

IN the year 1667, Sir *John Aiton* took out a charter of the lands of *Kippo* to himſelf, and ſuch perſons as he ſhould afterwards nominate, and under ſuch proviſions as he ſhould expreſs; and failing ſuch heirs of tailzie and proviſion, to himſelf, his heirs and aſſignies whatever.

*Anno* 1672, Sir *John* executed a nomination of heirs or an entail of the lands of *Kippo*, in favour of himſelf; whom failing, to *John Aiton* his nephew, and the heirs-male of his body; whom failing, to certain other ſubſtitutes, under ſtrict prohibitory, irritant and reſolutive clauſes; and a particular *proviſo*, that the heirs ſhould not alienate, *&c.* " without the " ſpecial advice and conſent of him (Sir *John*) being in life for the time; " and failing of him by deceaſe, without the advice and conſent of Mr. *James* " *Alexander* of *Kinglaſſie*, Mr *George Pittullo* Miniſter at *Kings-barns*, and " Dr *George Pittullo* his ſon, or of as many of them as be in life for the " time, firſt had and obtained.

Sir *John* died in the year 1676, and was ſucceeded by the ſaid *John Aiton* his nephew, for diſtinction called *John the firſt*, who poſſeſſed the eſtate as apparent heir of line to his uncle, without making up any titles till the year 1700, when, without taking any notice of the entail 1672, he compleated his title by a ſervice, as neareſt and lawful heir to Sir *John Aiton*.

The ſaid *John* the 1ſt, had iſſue *John* the 2d, and *Thomas* the purſuer, and in the poſtnuptial marriage-contract of the ſaid *John* the 2d 1709, *John* the 1ſt ſettled the Eſtate of *Kippo* and his proper family-eſtate of *Kinaldy* upon *John* the 2d and the heirs-male of his body, of that or any other marriage; whom failing " to *John* the 1ſt, his other heirs-male, " mentioned in his rights and diſpoſitions of the ſaid lands" *John* the 2d made up no titles in his perſon.

*John* the 2d had iſſue *Alexander* and *David*, and was ſucceeded in 1720 by *Alexander* his eldeſt ſon, who made up titles to the eſtate of *Kippo* upon the contract 1709, without taking any notice of the entail 1672.

In the year 1741, *Alexander* executed a ſettlement of the eſtate of *Kippo* in favour of himſelf, and the heirs of his body; whom failing, to his brother *David*, and the heirs of his body; whom failing, to *James Monnypenny*, who was not a ſubſtitute under the entail 1672.

*Alexander* and *David* having died without heirs of their bodies, *James Monnypenny* took up the eſtate.

*Thomas*

*Thomas Aiton* Son of *John* the 1ſt, and next ſubſtitute under the entail 1672 to *Alexander* and *David*, brought a declarator againſt *James Monnypenny*, that he *Thomas* had a right to the eſtate under the entail 1672; and that *Alexander* could not hurt his right of ſucceſſion by his deſtination to *James Monnypenny*.

All this time the entail 1672 had remained a latent deed in the repoſitories of the Family of *Kippo*.

It has been ſaid that *John* the 1ſt and *John* the 2d had male iſſue of their bodies; and that the eſtate was taken ſucceſſively up by the heir in poſſeſſion, upon titles independent of the entail 1672. But if the Minorities of each heir next in ſucceſſion, to each heir in poſſeſſion, had been deduced from the number of years in which the heirs in poſſeſſion, had poſſeſſed upon their titles made up as above, it would have been found that the poſſeſſion of all theſe heirs in poſſeſſion put together would not have amounted to 40 years.

*James Monnypenny*'s 1ſt defence was, That the nomination of heirs executed by Sir *John Aiton* having been neglected by every perſon intereſted in it for eighty years, and *John* the 2d having made up titles contrary to it near ſixty years ago, and the after heirs having made up their titles in the ſame Manner, *James*'s right was good both by the negative and poſitive preſcription.

*Pleaded* for *Thomas*, 1*mo*, That in this caſe no preſcription could run, there not being two ſeparate parties ſubſiſting at the ſame time, one to acquire a right, the other to loſe it by preſcription; for that *John Aiton* the 1ſt, and the ſubſequent heirs who ſucceeded to the eſtate in queſtion, continued to be both heirs of line and heirs of entail till the death of *Alexander*; and, during all that time, he, *Thomas*, was *non valens agere*, at leaſt *cum effectu*.

2*do*, That as the minority of parties intereſted ſtops the courſe of preſcription, ſo, in this caſe, the minority of each ſubſtitute next to the heir in poſſeſſion of the eſtate, at the time, as being more immediately intereſted in the preſcription of the entail, ought to be deduced from the years of preſcription; which being done, it would be found that forty years had not run.

*Pleaded* for *James Monnypenny*: That two rights of a different and contrary Nature had devolved to the ſame perſons, the one limited, and the other unlimited: That *John* the 1ſt declared his intention in the moſt expreſs manner to take the eſtate as heir of line to his uncle, and accordingly poſſeſſed it upon the unlimited title: That all the ſubſequent heirs compleated their titles, and poſſeſſed the eſtate in the ſame manner, totally relinquiſhing the other limited title, which ſubjected them to fetters and reſtrictions: That hereby they had eſtabliſhed a right pure and unlimited, which could not be defeated by a contrary right that had continued dormant beyond the years of preſcription: That it was always competent to the remoter heirs of entail to purſue for regiſtration of the entail, or at leaſt to oblige the heir intitled to poſſeſs, to make up titles conform thereto: That if *Thomas*'s principle ſhould take place, the ſalutary effects of preſcription would be loſt, and every family in the kingdom be expoſed to the loſs of their eſtates, even after the lapſe of centuries, upon the diſcovery of old neglected deeds: that, even purchaſers might be rendered unſecure, as limitations might be contained in antient rights, which could

not be discovered from the records; and therefore it had been an established principle, That the limitations and restrictions of an entail could be wrought off, by the heirs possessing the Estate upon unlimited titles, during the years of prescription.

2*do*, That *Thomas* could not avail himself of the plea of minority, when he himself had been of age above fifty years past: That the privilege of minority is intirely personal, and optional to the minor; it can be used by himself, and by those claiming his right only, but by no other person whatever; and therefore, tho' *Thomas* could have objected his own minority, yet he could not object that of any other of the heirs.

*James Monnypenny*'s 2d defence was, That the nomination 1672, referring to the charter 1667, imported only a temporary restriction or interdiction, whereby the granter only intended to subject his heirs to the direction of himself, and the three persons therein named, by whose advice and consent the whole limitations might have been discharged, and upon whose death they were absolutely at an end.

And 3*tio*, He *pleaded*, That the estate in question was, by the marriage settlement in 1709, provided to the heir of that marriage in Fee simple, and *Alexander Aiton*, in consequence thereof, took the estate in the same manner as a purchaser, for a valuable consideration, whose right cannot be defeated by a latent deed, which never was recorded or made effectual.

*Thomas Aiton answered* to the *second* defence, That, by the nomination or entail 1672, a permanent rule of succession was made, and by the words, as well as the intention of the settlement, the limitations were imposed upon all the heirs of entail, and were co-extensive with the destination of succession. A power was indeed granted to certain persons, in whom the maker had confidence, of relaxing the fetters or limitations; but that power was temporary and personal; and as it was never executed, the entail became absolute and perpetual, upon the death of those nominees.

To the *third*, That the conveyance made by *John* the 1st to his eldest son *John* the 2d in the postnuptial articles 1709, was in respect to *John* the 2d, and the children of the marriage, not an onerous, but a voluntary and gratuitous deed. It was a *præceptio hereditatis*, a passive title, which subjected *John* the 2d to all the debts and obligations of his father, and besides contained a destination of succession consonant with the entail 1672; and therefore these articles could not be pleaded by *John* the 2d, or his son *Alexander*, in bar of the entail 1672, which was binding upon *John* the 1st and all his representatives.

" The Lords found the negative and positive prescriptions not run;
" that the prohibitions in the entail are perpetual and binding on the
" several substitutes, after the death of the maker of the entail and
" nominees, and repelled the defence founded on the contract of
" Marriage 1709. J. D.

*Reversed.*

Act. *Lockhart*, *And. Pringle*, *A. Hamilton*, and *D. Rae*. Alt *Advocatus*, *Ferguson*, *J. Craigie*, and *M'Intosh*.
Clerk, *Forbes*.

N° CCXV. 10th *Auguſt* 1756.

Mr. *ANDREW TURNBULL* Miniſter and the Kirk-Seſſion of *Kippan*,

againſt

*JOHN M'CLAWS* and others.

THE Kirk-ſeſſion of *Kippan*, a land-ward pariſh, had been in uſe from time immemorial of keeping and letting for hire, mort-cloths for the funerals of perſons dying in the pariſh, and of applying for the uſe of the poor ſuch ſums as aroſe from the hire of theſe mort-cloths.

A congregation of the Seceders, within the bounds of this pariſh, bought mort-cloths, and let them out to hire among thoſe of their own perſuaſion.

The Kirk-ſeſſion brought a proceſs of damages againſt them, for uſing theſe mort-cloths, and thereby diminiſhing the produce of the mort-cloths of the Kirk-ſeſſion.

" The Lords found, That the Kirk-ſeſſion have the ſole right of keep-
" ing and letting for hire, for the uſe of the poor, mort-cloths
" within the bounds of the pariſh, and that the Defenders have no
" right to keep mort-cloths, and give the ſame out to hire, or even
" to lend the ſame gratuitouſly for burying any of the dead within
" the ſaid pariſh, with certification that they ſhall be accountable
" to the Kirk-Seſſion, for the ordinary dues of their mort-cloths in
" the like caſes. J. D.

Act. *George Mallace.* Alt. *Lockhart.*

*Nota*, In a caſe in 1718 betwixt the Kirk-Seſſion, and the trades of *Kilwinning*, the Lords had found " That the Kirk-Seſſion of *Kilwinning* had
" the ſole power of lending out of mort-cloths upon hire for the benefit
" of the poor, and that the poor of the ſaid pariſh have right to the
" money, ariſing from lending of mort-cloths upon hire within the
" ſaid pariſh; and ſicklike that the Kirk-Seſſion there hath the ſole
" right to adminiſtrate the ſame, but prejudice to private perſons, to
" make uſe of their own mort-cloths belonging to themſelves, and
" decerned the defenders to forbear uſing mort-cloths of their own,
" or lending out the ſame for money, or otherways, to others thro'
" the ſaid pariſh, or any part thereof in time coming, but prejudice
" always to private perſons to make uſe of their own mort-cloths be-
" longing to themſelves, as ſaid is."

The Deciſion does not appear in any printed collection; but the evidence of it was produced to the Court in the preſent queſtion.

N° CCXVI. 16th *November* 1756.

## *MALCOLM GORY*

against

## *ANDREW DONALDSON.*

IN a ranking of the creditors of *Nairn*, it was objected by *Donaldſon*, That an inhibition uſed by *Gory* was null, for that the execution of it bore, " That a copy was fixed upon the door of the debtor's houſe, after " the meſſenger had made ſix ſeveral knocks as uſe is, *becauſe he could not* " *get the debtor perſonally*;" whereas the 75th Act. 6. Parl. *Jam.* V. authoriſes this method of execution in the caſe only, when acceſs to the houſe cannot be got, or the ſervants refuſe to receive the copy: neither of which this execution bears.

*Pleaded* for *Gory*, 1*mo*, The ſame objection was made to the execution of a horning 30th *July* 1696, *Sinclair* againſt Lord *Bargeny*, and to the execution of an appryſing 20th of *December* 1705 *Scrymgeour* againſt *Beatſon*, and was in both caſes repelled. As the ſame act which regulates the form of the execution of hornings and appryſings, regulates the execution of inhibitions, the ſame judgment ought to be given in this caſe; more eſpecially as the execution againſt the lieges was undoubtedly formal and the inhibition regiſtrated, ſo that *Donaldſon* cannot pretend to have contracted *bonâ fide* with the perſon inhibited.

*Pleaded* for *Donaldſon*, The deciſions are not in point, for that *there* the execution bore that the meſſenger gave ſix knocks, and this implied that he ſought entrance; the execution of inhibitions muſt be preciſely formal, for that by them the preference of creditors is regulated. And therefore an execution of an inhibition was found null becauſe it only bore *ſeveral* knocks, and not *ſix* knocks, 29th of *July* 1680, *Hay* againſt *Pourie*. Neither does the formality of the execution againſt the lieges vary the caſe; for that he who ſees that an inhibition upon record is null, by reaſon of its informality, may *bonâ fide* contract with the perſon inhibited, in the ſame manner as he may contract, who ſees that a ſaſine upon record is null by reaſon of its informality.

" The Lords repelled the objection." D.

For *Gory*, *Græme*. Alt. *Nairn*, *Rae*. Reporter, *Woodhall*. Clerk, *Gibſon*.

N°CCXVII. 24th *November* 1756.

## *WILLIAM SANDERSON*

against

## The MARQUIS of *TWEEDDALE* and *JOHN CARFRAE*.

THE Marquis of *Tweeddale* granted a leaſe of the farm of *Gamilſtone* to *Walter Hay*, " his heirs, executors and aſſignies whatever, of no " higher degree than himſelf, and with whom the Marquis ſhall be content

" content and accept of allenarly." This leaſe was to endure for forty five years and a life.

*Hay* aſſigned this leaſe to *Sanderſon*, but reſerved to himſelf a faculty of reſuming his right, on payment of all the money which *Sanderſon* had advanced for him or expended upon the farm.

*Sanderſon* brought an action for encroachments againſt *Carfrae*, a neighbouring tenant. The Marquis of *Tweeddale* appeared for his intereſt, and objected, that action was not competent at the inſtance of *Sanderſon*, as not being an aſſignee *accepted* by him, and he laid his plea on the clauſe aforeſaid in the leaſe to *Hay*, and on the deciſion 4th *December* 1747, *Elliot* againſt the Duke of *Buccleugh*.

*Pleaded* for *Sanderſon:* This clauſe by which all aſſignees are, with one limitation, admitted, is neither equivalent to a clauſe expreſsly ſecluding, nor to a clauſe admitting all aſſignees: the limitation muſt imply that the Marquis may refuſe an aſſignee, providing always that he ſhew ſome reaſonable cauſe for ſuch refuſal; no ſuch cauſe is here pretended. Had the Marquis meant to have reſerved to himſelf an arbitrary power of refuſal, he would have expreſsly ſecluded aſſignees; but this has not been done, altho' moſt uſual in leaſes. Nor can a leaſe, which is granted to executors, import a total excluſion of aſſignees. The deciſion, *Elliot* againſt the Duke of *Buccleugh*, is not in point: in that caſe the tack was conceived " to " heirs and ſuch of the tenant's aſſignees as the Duke ſhould approve of, " excluding all others his aſſignees." The Court found " that the tack, " as it expreſsly ſecluded aſſignees, was not adjudgeable." *There* aſſignees were particularly excluded, *here* they are not: further, there is a difference between the adjudication of a leaſe, and an aſſignation of a leaſe, granted, as in this caſe, in ſecurity of a debt. The *former* becomes, at the expiry of the legal, an abſolute right, and ſubſtitutes a new tenant in the place of the original tenant. The *latter*, leaves to the cedent the right to the leaſe, and the faculty of reſuming the exerciſe of that right. Hereby the proprietor is not prejudiced, but benefited; for that the cedent continues, and the aſſignee becomes liable to him.

*Pleaded* for the Marquis of *Tweeddale:* The clauſe imports, that the leaſe ſhall go to ſuch aſſignees only as the Marquis ſhall be pleaſed to accept, nor is he bound to ſhew cauſe for not accepting; ſuch obligation would be productive of frequent law-ſuits. No argument can be drawn from the inſertion of the word *executors*; it is a word of ſtyle inadvertently employed; and, were the queſtion with executors claiming right to the leaſe, it would be held *pro non adjecto*. The caſe of *Elliot* is in point; there the leaſe was *to ſuch aſſignees as the Maſter ſhall conſent to, excluding all others.* Here *to ſuch aſſignees as he ſhall conſent to and accept of allenarly*; in both caſes it is provided, that the leaſe be aſſignable only with conſent of the Maſter. According to the judgment in the caſe of *Elliot*, this leaſe is not adjudgeable; and if not adjudgeable, it cannot be aſſigned; for that an adjudication is a legal aſſignation; and if a legal aſſignation be not effectual, a voluntary aſſignation cannot. Neither does it vary the caſe, that the aſſignation to the purſuer is not abſolute, but in ſecurity for a debt; for that, if the tenant may thus aſſign the leaſe to one creditor, he may, by parity of reaſon, aſſign it to all his creditors ſucceſſively, whereby he and they would alternately poſſeſs the farm; no maſter can be preſumed to have granted a leaſe on terms ſo manifeſtly detrimental.

" The Lords foundthat the purſuer had no title to inſiſt in this action." D.

Act. *Garden, D. Dalrymple.* Alt. *Hay, A. Pringle, Lockhart.* Clerk, *Kirkpatrick.*

N° CCXVIII. 8th *December* 1756.

## *GEORGE THOMSON* Merchant in *Falkirk*, againſt The MAGISTRATES of *Stirling*, and *THOMAS BLACKADER* Goaler there.

IN *November* 1750, *John Rankine* was impriſoned within the Tolbooth of *Stirling*, by virtue of a caption raiſed againſt him at the inſtance of *George Thomſon*, for a debt due by *Rankine* to *Thomſon*; and about the ſame time *Robert Brown* was impriſoned within the ſaid Tolbooth, at the inſtance of ſome of his Creditors.

Theſe priſoners were kept in goal in the ſame manner that other priſoners for debt in the tolbooth of *Stirling* are uſually kept; that is, they were permitted, in the day time, to go through the priſon, being only ſecured from eſcaping by the ſtreet-door, which was locked on them; but in the night-time they were locked up in a room.

In *December* 1750, theſe two priſoners formed a ſcheme for making their eſcape, which they executed in this manner: When the Goaler came into priſon about 6 o'clock in the evening, they pretended that they wanted ſome paper to write letters to their friends, and deſired the Goaler to bring them the paper; upon his return with it, they were ſtanding behind the ſtreet-door, and, on his opening it, they knocked him down, and run off.

The Magiſtrates immediately made ſearch for the priſoners, and, in a few days, they were apprehended, and again committed to the tolbooth of *Stirling*.

*George Thomſon* brought a proceſs before the Sheriff of *Stirling* againſt the Magiſtrates and Goaler, in order to have them found liable for the debt due to him, on account of their allowing *Rankine* to eſcape; and the Sheriff pronounced decreet againſt them.

Of this Decreet the Magiſtrates and Goaler obtained ſuſpenſion, and *pleaded*, That they ought not to be found liable for the debt, 1*ſt*, Becauſe the priſoner had not eſcaped through any fault of theirs, but *vi majori*, for which they were not liable.

2*dly*, That they had *ex incontinenti* made ſearch for and apprehended the priſoner, and recommitted him to the Tolbooth of *Stirling*; ſo that the charger ſuſtained no damage by the eſcape.

*Anſwered* for the charger: To the *firſt* reaſon of ſuſpenſion, That the priſoner had not been properly kept; for he ought not to have been permitted to go about the priſon, but ſhould have been locked up in a room; in which caſe he could not have put in execution the ſtratagem by which he eſcaped.

And to the 2*d* reaſon of ſuſpenſion, That the recommitting of *Rankine* to priſon, could not liberate the ſuſpenders; for by the eſcape there was a *jus quæſitum* to the charger, which could not be taken from him; and the keeping a priſoner perpetually under the *ſqualor carceris* is one thing which is in view by the caption, in order thereby to force him to make payment; from this he was for ſome time relieved by his eſcape, and he might

might perhaps, when out of priſon, have ſecreted his effects to the prejudice of the Charger.

" The Lords found the Magiſtrates and their Goaler having commit-
" ted no fault, were not liable, and therefore ſuſpended the letters
" *ſimpliciter*." B.

For the Charger, *Williamſon*. Alt. *Brown & Bruce*.

N° CCXIX. 10th *December* 1756.

## The CORPORATION of TAYLORS in *Perth* againſt *MARY LION*, and others, Mantua-makers there.

*PERTH* was erected into a Royal borough by *William* I. in the year 1210. The Taylors of *Perth* have no *ſeal of cauſe*, but they have been held immemorially to be a corporation. As ſuch they enjoy the accuſtomed excluſive privileges of corporations, and elect a deacon, who is a counſellor of the borough in right of his office.

They brought an action againſt the defenders, ſetting furth the antiquity of their corporation, and its poſſeſſion of " the excluſive privilege of ma-
" king all kinds of taylor-work ;" that the defenders, not being free of the corporation, had exerciſed the buſineſs of mantua-making within the liberty of that borough ; and concluding, that the defenders ſhould be decerned to deſiſt therefrom, and find ſecurity to that effect.

The defenders *pleaded*, that they had not encroached upon the excluſive privileges of the corporation; for that the making of womens apparel is no kind of *taylor-work*. According to the received notions of *decorum*, it is an improper employment for men, and, in conſequence of the modern faſhion of dreſs, it has become an employment wholly diſtinct from that of a taylor. Further, by the law of corporations, every one muſt have his qualifications tried before admiſſion, and after admiſſion is intitled to the privileges of the corporation. Now the purſuers cannot, in the preſent caſe, either make this trial of the defenders, or beſtow theſe privileges upon them. Hence it follows, that mantua-making is diſtinct from the employment of taylors, and in no ſort dependent on it.

*Anſwered* for the Purſuers: The excluſive privileges of corporations, as by law eſtabliſhed, are not to be impaired under imaginary pretences of *decorum*. Male ſtay-makers are employed by women, and, by parity of reaſon, male-taylors may. In former ages there was *decorum* as well as in the preſent ; there was alſo a diverſity in dreſs ; and yet the occupation and name of mantua-makers were then unknown, and men only were employed in making womens apparel.

" The Lords found the action not competent, and that therefore the
" purſuers have no right to debar the defenders from the exerciſe of
" the trade of mantua-making." D.

Act. *Craigie, A. Pringle*. Alt. *W. Stewart, S. D. Dalrymple, Moncrief* Reporter, *Preſtongrange*. Clerk, *Juſtice*.

N° CCXX.

N° CCXIX. 14th *December* 1756.

*JAMES NEILL* Merchant in *Ayr*,

againſt

*JOHN CAMPBELL* of *Skirrington*.

*CATHCART* of *Drumjoan* was debitor to *M'Rae* in a certain ſum by bond.

He died leaving three heirs portioners, the ſaid *M'Rae*, *William Campbell* and *Abigail Rankine*, mother to the defender.

In the 1727, he had diſponed his eſtate to Lord *Cathcart*, reſerving a power to alter; and, in conſequence of that power, ſome ſhort time before his death, he made a ſettlement of his whole eſtate upon the defender's mother.

Lord *Cathcart* got a diſpoſition from *M'Rae* and *Campbell*, the other heirs-portioners, of their right of ſucceſſion and brought a reduction of *Drumjoan*'s laſt Settlement.

*M'Rae*, by his diſpoſition to his Lordſhip, "as one of the apparent "heirs-portioners of *Cathcart* of *Drumjoan*, ſells the lands of Drumjoan, "and certain other lands, *with all right which he as one of the apparent heirs-portioners aforeſaid could pretend thereto*; and further aſſigns to him "the heirſhip moveable, and all the moveables to which he had right, "as one of the neareſt of kin; all which he obliges him to warrant from "his own and his ſucceſſors facts and deeds allenarly; and to renew theſe "preſents if neceſſary, for effectually denuding himſelf of the premiſes, "*as one of the heirs-portioners foreſaid.*" And Lord *Cathcart* becomes bound to free *M'Rae of all payment, hazard and danger of any debts of the ſaid* Cathcart *of Drumjoan.*

Lord *Cathcart*'s action of reduction ended in a ſubmiſſion and decreet-arbitral, awarding the eſtates of *Cathcart* of *Drumjoan* to the defender and his mother, and obliging them to relieve Lord *Cathcart* of all *debts* due by the ſaid *Drumjoan* which may *any ways affect his Lordſhip, or the ſaid* M'Rae or Campbell, from whom he derives right, *as heirs-portioners foreſaid.*

*Neill*, aſſignee by *M'Rae* to the bond above-mentioned due by *Drumjoan*, purſued *Abigail Rankine*, and her ſon, for payment; and *concluded*, that the tranſaction between *M'Rae* and Lord *Cathcart* was an *emptio venditio hereditatis*; *M'Rae* ſold to his Lordſhip all intereſt which he had in the eſtate, heritable and moveable, of *Cathcart* and *Drumjoan*, as one of the heirs-portioners and neareſt of kin to him. This debt was no part of the right of ſucceſſion ſold: it did not belong to *M'Rae* the ſeller as heir-portioner but as a creditor to *Drumjoan*; that therefore it was not conveyed to Lord *Cathcart*, who was only *emptor juris hereditarii:* it is a debt ſubſiſting in the perſon of *M'Rae qua* creditor, and conveyed to the purſuer. This is agreeable to the principles of the *Roman* law, *L.* 2. *pr.* and § 4. *ff. de her. vel Act. vend.* and *L.* 2. § 18, 19. *ff. eod.* where the very point in queſtion is determined.

*Anſwered* for the defender: He is no further liable for the debt than Lord *Cathcart* would have been. And *M'Rae*'s diſpoſition to his Lordſhip, tho' it does not expreſsly convey this debt, yet it neceſſarily implies a virtual

tual conveyance of it, after which *M'Rae* could not have purſued his Lordſhip for payment, without incurring the warrandice in his diſpoſition. A diſpoſition of property is underſtood to convey every right in the perſon of the diſponer affecting that property. Rights acquired after the date of the diſpoſition do *ipſo jure* accreſs to the diſponee. One having a right in ſecurity conſenting to a diſpoſition of the ſubject affected, ſuch conſent imports effectually a paſſing from all right in the ſubject. The principles of the *Roman* law do not apply to this caſe. Here was no *emptio hæreditatis*, which is an *emptio univerſitatis lucri et damni:* For, 1*mo*, Lord *Cathcart* only purchaſes the lands of *Drumjoan*, and others mentioned, without any general clauſe, comprehending the whole eſtate to which *M'Rae* had right as heir to *Drumjoan*. 2*do*, By the diſpoſition he came under no obligation to pay the whole debts of *Drumjoan*. The words of the obligation are, to relieve *M'Rae of all payment, hazard and danger from* Drumjoan's *debts*; but that cannot include the debt in queſtion; for *M'Rae* was in no hazard or danger from this debt in which he himſelf was the creditor.

" The Lords repelled the defences pleaded for the defender, and found " him liable for the whole debt purſued for." W. S.

Act. *Miller.* Alt. *Brown.* Clerk, *Forbes.*

N° CCXXI. 14th *December* 1756.

## *JEAN PATON.*

againſt

## *KATHARINE ALEXANDER.*

*FRANCIS PATON*, the purſuer's father, by his contract of marriage with his firſt wife, obliged himſelf to provide and ſecure 900 merks to himſelf and wife, in conjunct fee and liferent, and to the children of the marriage in fee, and to lay out the ſame upon annualrent. He afterwards married the defender *Alexander*, and his contract of marriage with her proceeds upon a narrative, That he intends to do juſtice to his children by his firſt marriage, and provides and declares, that certain tenements and lands therein mentioned ſhall be affected with and ſhall be a real ſecurity to the ſaid children for the foreſaid ſum of 900 merks, which they are to accept in lieu of all they can aſk or claim thro' his deceaſe. Then follows a clauſe, obliging the huſband, his heirs, *&c.* to infeft and ſeiſe the defender in the ſaids tenements, and for that effect binds him and his heirs in abſolute warrandice.

*Jean Paton*, the only child of the firſt marriage, brought a proceſs againſt *Katharine Alexander* the relict, to have it found and declared that the tenements and lands mentioned in the ſecond contract of marriage are affected with the ſaid 900 merks, and that the defenders ſhould be found liable in payment of the annualrents thereof from the death of her ſaid huſband.

*Pleaded* for the defender: 1*mo*, That the proviſion in the firſt contract of marriage in favours of the purſuer, which ſhe could only take by way

of ſucceſſion, could not exclude the onerous deeds of her father, ſuch as a rational proviſion to a ſecond wife.

2*do*, That the real ſecurity intended to be given to that proviſion is only againſt the fee of theſe ſubjects as provided to the children of the ſecond marriage; and there is no clauſe burdening the defender's liferent with the ſaid ſum.

3*tio*, The purſuer, as heir of the deceas'd *Francis Paton*, is liable to the defender, by the clauſe of warrandice in the ſecond contract of marriage, *et fruſtra petit quod mox eſt reſtitutura.*

4*to*, There can be no claim for annualrent, as both contracts of marriage declare, that the ſum of 900 merks ſhall be in lieu of all the purſuer can aſk or claim thro' her father's deceaſe.

*Anſwered* to the 1*ſt*: It could by no means be conſtructed a rational proviſion in favours of the defender to give her a total liferent of the ſubject, and to allow the children to ſtarve during her life.

To the 2*d*, The tenement and lands mentioned in the ſecond contract of marriage are expreſsly declared to be ſubject to the burden of 900 merks to the children of the firſt marriage; and tho' there is no repetition of this burden in the clauſe ſecuring the defender in her liferent, yet ſhe has conſented to this by ſubſcribing the contract, and by poſſeſſing in conſequence thereof, *et nemo poteſt idem approbare et reprobare.*

To the 3*d*, It is a begging of the queſtion to ſay, that the purſuer, as heir to her father, is liable in the warrandice; for the purſuer contends, that the defender's liferent-right is burdened with this proviſion.

To the 4*th*, The firſt contract of marriage declares, that the ſum ſhall be laid out upon annualrent; and, by the ſecond, the proviſions in the firſt, ſo far as regard the children, are renewed, and expreſsly reſerved; conſequently the annualrent, as well as the principal ſum, is due.

" The Lords found the defender liable for the aunualrent of the 900 " merks from the time of her huſband's deceaſe, and in time " coming during her life." W. S.

Act. *Ja. Dundas.* Alt. *J. Craigie.* Clerk, *Kirkpatrick*

## N° CCXXII. 14th *December* 1756.

Sir *ROBERT GORDON* of *Gordonſton*, Sir *ALEXANDER GRANT* of *Dalvey*, *JOHN INNES* of *Leuchars*, and *LUDOVICK GRANT* of *Grangegreen*, Petitioners.

THESE Gentlemen being poſſeſſed of land in the county of *Murray*, which ſtood in the Ceſs-books valued *in cumulo* with the other lands in the county, applied to a General meeting of the Commiſſioners of ſupply, on the 17th *Auguſt* 1756, for a diviſion of thoſe *cumulo*-valuations. The Commiſſioners proceeded to the diviſion, took a proof of the real rent of the lands, and remitted to an accomptant to proportion the valuation according to the real rent.

At a ſubſequent meeting on the 1*ſt* of *October* thereafter, the accomptant's report not being ready, the Commiſſioners adjourned the General meeting to the ſecond *Tueſday* of *May*.

The

The Petitioners applied to the Conveener of the Commiſſioners, requiring him to call a General Meeting immediately; for that before the 2d Tueſday of *May*, the Commiſſioners might all be ſuperſeded by the new Commiſſion for the enſuing year, and ſo the whole proceedings in the diviſion would be loſt. To which he anſwered, " That he was " ready to grant the deſire of this application; but it was now out of his " power, as the Commiſſioners had adjourned their General meeting till " *May*; yet he was ready to do every thing incumbent on him when " properly authoriſed."

In theſe circumſtances the Gentlemen applied to the Court of Seſſion by petitions, craving warrant to the Conveener to call a General meeting.

It occurred to ſome of the Lords, that, in common form, theſe petitions ſhould be ordered to be ſerved upon the Conveener and Commiſſioners, whereby they might have an opportunity of anſwering them. But it being obſerved that the Conveener was willing to do his duty, and only wanted authority, as he erroneouſly imagined, that form was judged unneceſſary.

" The Lords found that the Conveener of the Commiſſioners of Sup-
" ply of the ſhire of *Murray* may, notwithſtanding of the adjourn-
" ment made by the ſaid Commiſſioners to the 2d *Tueſday* of *May*
" next, upon the application of the petitioners, or any other party
" having intereſt, call a General meeting of the ſaid Commiſſioners
" without delay." W. S.

For the Petitioners, *Lockhart, Hamilton-Gordon.* Clerk, *Pringle.*

## N° CCXXIII. 14th *December* 1756.

### Competition CREDITORS of *DICK* of *Frackafield.*

*DICK* of *Frackafield* obliged himſelf, by Miſſive, " to pay to " Mrs. *Brower* at *Rotterdam*, in *Auguſt* or *September* 1741, 4620 " guildres 1 ſtiver, as the price of goods furniſhed by her, or to apply that " ſum towards the paying of what fiſh ſhe might contract for betwixt and " that time, in her option." A partial payment was made to her at the time appointed; but there does not appear to have been any further correſpondence between them. Upon the renunciation of *Dick*'s heir, *Brower* obtained decreet of adjudication *cognitionis cauſa*, in *December* 1746, for L. 373: 11: 1 *Sterling*, the balance then due, with annualrent from *September* 1741, together with L. 20 *Sterling*, as the expences of the decreet of conſtitution, which preceeded the adjudication.

In a ranking of *Dick*'s creditors, it was objected to *Brower*'s adjudication, 1*mo*, That ſhe ought not to be ranked for the annualrent prior to the decreet of adjudication: For it does not appear, that there was any undue delay upon the part of *Dick*; *Brower* does not pretend to prove, that ſhe made her election of having the money paid to her at *Rotterdam* in *Auguſt* or *September* 1741; but whatever effect this delay, if there was any, might have againſt the debtors themſelves, it can have none in a competition with onerous creditors.

2*do*,

2*do*, With regard to the L. 20, *objected*, That it was a ſum given at random, as expences of a decreet of conſtitution, where there was no litigation, and which went in abſence upon the renunciation of the heir.

*Anſwered* for Mrs. *Brower*: It is incumbent upon the other Creditors, to ſhow, that ſhe gave contrary orders for paying the money otherways than at *Rotterdam*. No ſuch orders are alledged, and even a partial payment is made there at the time agreed upon. Annualrent is due *ex mora*, eſpecially *in rebus mercatoriis*; and it has been found, that merchants are intitled to annualrent upon an open accompt of furniſhings, after expiry of a year from the date of the laſt article, even without any docquetted accompt, or obligation from the debtor.

2*do*, As to the L. 20, ſhe was obliged to bring the proceſs of conſtitution, in order to make her debt effectual; nor can the ſum be thought extravagant, ſhe being obliged to purſue for it in a foreign country, tho' payable by paction at *Rotterdam*.

" The Lords found annualrent due upon the balance of L. 373 : 11 : 1
" *Sterling* from *September* 1741; but found her not intitled to the
" L. 20 *Sterling nomine damni* decerned to her in the decreet *cognitio-*
" *nis cauſa*. W. S.

For *Brower*, *D. Rat.* Alt. *Ch. Hamilton-Gordon.* Clerk, *Juſtice*,

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ABSTRACT

# ABSTRACT

OF THE

## JUDGMENTS of the HOUSE of LORDS,

IN THE

## CASES contained in this VOLUME.

N° III.

### Captain *JOHN GORDON*

against

### His MAJESTY's ADVOCATE.

" *PROPOSED*, That the Judges be desired to deliver their opinion
" upon the following question, *viz.*

" Tenant in tail-male of lands in *England*, with remainder over, is at-
" tainted of high treason, and the estate-tail thereby forfeited to the Crown;
" after this attainder tenant in tail-male hath issue born in foreign parts
" out of the liegeance of the Crown of *Great Britain*, and dies leaving
" such issue-male.

" Q. Is the estate or interest, which was forfeited to the Crown as a-
" foresaid, continued or determined?

" Which being agreed to,

" The Lord Chief Baron of the Court of Exchequer, having conferred
" with the other Judges present, delivered their unanimous opinion, That
" the estate or interest in the lands as aforesaid is determined.

" *Ordered* and *adjudged*, That the interlocutors complained of be re-
" versed.

" *Proposed* to declare, That, in the event which has happened, the ap-
" pellant hath right to the estate and barony of *Park*, according to the
" substitution mentioned in the judgment of this House of the 21st of
" *May* 1751, and that he be allowed the benefit of such right; and
" that it be remitted to the Court of Session in *Scotland* to make such or-
" der, and to carry on such proceedings, for putting the appellant in pos-
" session of the premisses, and concerning the profits thereof as are com-
" petent to the said Court, and agreeable to law and justice.

" *Ordered* accordingly."

N° XVI.

The Duke of *NORFOLK* and Partners

againſt

The TRUSTEES for the Annuitants of the *York-buildings* Company.

" *ORDERED*, That the appeal be diſmiſſed, and that the interlocutor " of the whole Lords of the 30th *June* 1752 be affirmed."

N° XIX.

Sir *KENNETH M'KENZIE*

againſt

*JOHN STEWART.*

" *ORDERED*, That the interlocutor complained of, 1ſt *July* 1752, " be reverſed, and that the Court of Seſſion do proceed according to " juſtice and the rules of that court, without prejudice to any queſtion " that may hereafter ariſe concerning the relief to which the appellant " may be intitled, and againſt what perſons or ſubjects ſuch relief (if any) " ought to be extended."

N° LIX.

*WILLIAM DOUGLAS* and his Truſtee

againſt

Mrs *ISABEL DOUGLAS.*

" *ORDERED*, That the interlocutors complained of be affirmed."

N° LXX.

His MAJESTY's Advocate

againſt

The Reverend Mr *ROBERT DICK.*

" *ORDERED*, That the interlocutor of the 2d of *March* 1753 be " reverſed."

N° LXXXIV.

N° LXXXIV.

*WILLIAM URQUHART* of *Meldrum*

againſt

The OFFICERS of STATE and HERITORS of *Cromarty*.

" *ORDERED* and *adjudged*, That ſuch parts of the interlocutor 28th " *July* 1753 as are complained of in the original appeal (*viz.* thoſe which " ſuſtain the objection, That the witneſſes deſignations were not inſerted " in the body of the contract 1636) be reverſed, and that the want of " deſignation of the witneſſes to the ſaid contracts be repelled."

" Moved alſo, That the croſs-appeal be diſmiſſed, and that ſuch parts " of the ſaid interlocutors as are therein complained of (*viz.* thoſe which " repel the objections to the Biſhop of *Roſs*'s ſeiſin, and the plea founded " on the act 1695) be affirmed."

N° LXXXVI.

Mr *JOHN GOWDIE*

againſt

The Truſtees of *MURRAY* of *Cherrytrees*.

" *ORDERED*, That the interlocutors complained of be affirmed."

N° XC.

Major *ARTHUR FORBES*

againſt

Mrs *KATHARINE MAITLAND*.

" *ORDERED*, That the interlocutor complained of be affirmed."

N° XCIV.

Duke of *DOUGLAS*

againſt

*LOCKHART*.

" *ORDERED*, That the interlocutors complained of (*viz.* thoſe " which found, that the act 14. *Geo.* II. *c.* 44. extended to *Scotland*) be " reverſed."

N° CV.

*ARCHIBALD CAMPBELL*

againſt

Captain *JOHN STIRLING*.

" *ORDERED*, That the interlocutors complained of be affirmed."

N° CVII.

N° CVII.

Sir *LEWIS M'KENZIE* of *Scatwell*

againſt

His MAJESTY's Advocate.

" *ORDERED*, That the interlocutor of the 9th *March* 1754, com-
" plained of, be reverſed."

*N. B.* The decree was reverſed upon a ground entirely diſtinct from that which is ſtated in the deciſion, N° CVII.

N° CXI.

Mrs *BURROUGHS*, &c.

againſt

Sir *ARCHIBALD GRANT*.

" *ORDERED*, That the interlocutors and parts of interlocutors
" complained of by the original appeal (*viz.* thoſe which found Sir *Ar-*
" *chibald* entitled to plead compenſation, to the extent of the annualrents
" which fell due during Mr *Burroughs*'s life) be reverſed, and thoſe com-
" plained of by the croſs-appeal be affirmed."

N° CXII.

Crenitors of *JOHN BURNET*

againſt

*JAMES MURRAY* Receiver-General of the Cuſtoms.

" *ORDERED*, That the interlocutor complained of be affirmed."

N° CXXI.

*ISABELLA GRANT*

againſt

*DAVID SUTHERLAND*.

" *ORDERED*, That the interlocutor of 12th *December* 1754 be
" affirmed."

N° CXXXII.

Lord *CATHCART*

againſt

*JOHN STEWART NICOLSON SHAW*.

" *ORDERED*, That the interlocutors complained of be affirmed."

N° CXXXVI.

N° CXXXVI.

Mrs *JEAN MARIA FORBES*, &c.

against

Lord *FORBES*.

"*DECLARED*, That the bond of provision in queſtion having "been granted in execution of a faculty reſerved in the contract of mar- "riage, the exception of deathbed did not lie either againſt the princi- "pal ſum of *L.* 2000, or the annualrents or intereſt thereof; and it is "therefore ordered, That ſo much of the ſaid interlocutors as are complain- "ed of (ſuſtaining the defence of deathbed to the extent of the annual- "rents) be reverſed, and that the defence of deathbed be repelled; and "it is further ordered, That the cauſe be remitted to the Court of Seſſion "in *Scotland* to proceed therein accordingly."

N° CXXXVIII.

*NINIAN JAFFRAY*, and others,

againſt

The Duke of *ROXBURGH*.

"*ORDERED*, That the defence offered for the appellant, with re- "ſpect to the cuſtoms and duties, and the little iſland called *Ana*, or the "ſand-bed, be ſuſtained; and that as to the ſaid cuſtoms and duties, and "the ſaid little iſland, the appellant be aſſoilzied."

N° CXXXIX.

CREDITORS upon the Eſtate of *Woodſtone*

againſt

Colonel *SCOT* of *Comiſtone*.

"*ORDERED*, That the interlocutors complained of (*viz.* thoſe "which repelled the objection to Colonel *Scot*'s heritable bond) be re- "verſed; and declared, That *Alexander Turnbull* having been arreſted, and "actually in cuſtody of the meſſenger, upon the caption at the ſuit of "Sir *William Ogilvie*, was impriſoned within the true intent and meaning "of the act of Parliament 1696."

N° CLXXIII.

*JOHN WILSON*

against

*ROBERT BRUNTON.*

" ONE Counsel appearing for the appellant, who stating the case, and " praying a reversal of the said interlocutor, 7th *January* 1756; *Ordered*, " That the said interlocutor complained of be reversed."

N° CLXXV.

*JOHN DUNDAS*

against

The Officers of State, and the *MARQUIS* of *Tweeddale*.

" *ORDERED*, That the interlocutors complained of be affirmed."

N° CLXXXVII.

*LILIAS BREBNER*, and others,

against

*JOHN LAW.*

" *ORDERED*, That the interlocutor complained of be affirmed, " with this variation, after the words, *repel the objections proponed against*, " that the words, *proceeding in*, be inserted."

N° CLXXXIX.

INHABITANTS of *Stromness*

against

The BURGH of *Kirkwall.*

" *ORDERED*, That the interlocutors complained of be affirmed."

N° CXCIII.

*EMILIA* and *MARGARET FARQUHARSONS*

against

*JAMES FARQUHARSON.*

" *ORDERED*, That the interlocutor complained of be affirmed."

N° CXCVII.

N° CXCVII.

*JOHN FORBES*

against

His MAJESTY's Advocate.

"*ORDERED*, That the interlocutor complained of, 9th *March* "1756, be reverſed, and the reſpondent's claim diſmiſſed."

N° CCXIV.

*THOMAS AITON*

against

*JAMES MONYPENNY.*

"*ORDERED*, That the interlocutors complained of (*viz.* thoſe "which repelled the defence of preſcription, and found the entail 1672 to "be perpetual) be reverſed; and further ordered, That the defences made "by the appellants, founded upon the conſtruction of the deed of nomina-"tion of the 15th of *October* 1672, and upon preſcription, be ſuſtained; "and that the ſaid appellants be aſſoilzied from this ſuit."

# ERRATA.

| Page. | line. | |
|---|---|---|
| 2. | 34. | *after* perſons *add* who |
| 4. | 25. | *read* 9. Geo. II. |
| 8. | 12. | *for* attacked *read* attached |
| 16. | 40. | *for* objections *read* executions |
| 19. | 19. | *for* built *read* build |
| 20. | 29. | *for* the country *read* Scotland |
| 27. | | in the interlocutor, the firſt two lines and one half, ſhould not be marked as the interlocutor, but the interlocutor ſhould begin, "The Lords, in regard, *&c.* |
| 28. | 7. | *for* Delry *read* Delny. |
| 36. | 10. | *read* of a feu |
| 38. | 36. | *for* what ever *read* whatever |
| 40. | 42. | *for* proceed *read* proceeds |
| 41. | 31. | *for* commonity *read* commonty |
| 53. | 1. | *read* Janet conveyed to her huſband. |
| | 13. | *read* ſubjects |
| 56. | 15. | *dele* an |
| 68. | 5. | read, *fit ſubſecuta* |
| 76. | 30. | for *in capaces* read *incapaces.* |
| 80. | 23. | *for* 1752 *read* 1753 |
| 82. | 15. | for *ab* read *ad* |
| 91. | 8. | *for* trial *read* a trial |
| 118. | 26. | *for* June *read* July |
| 119. | 9. 12. | *for* Dumferline *read* Dunfermline |

| Page. | line. | |
|---|---|---|
| 127. | 10. | *for* prepared *read* proponed |
| | 23. | *for* on *read* or |
| 128. | 6. | *for* declaration *read* declarator |
| 148. | 15. | *for* and *read* as |
| 152. | 18. | *for* N° CIV. *read*, N° CV. |
| 156. | 27. | *for* theſe *read* thoſe |
| 159. | 10. | *dele* and |
| 169. | 1. | *for* contended: *read* contended, |
| 175. | 10. | *after* reſtored *place a* comma, *and delete the* comma *at* minors |
| 182. | 33. | *after the word* made *read* to |
| 185. | 39. | *for* producling *read* producing |
| 192. | 21. | *for* againg *read* againſt |
| 193. | 11. | *for* or which *read* on which |
| 194. | 14. | in caſe of heirs-male *read* in caſe of failure of heirs-male. |
| 196. | 39. | *for* the defender,—contained *read* the defender, as heir of line, of the annualrents of the 20,000 merks contained |
| 211. | 16. | *for* were *read* are |
| | 19. | *for* were *read* are |
| 225. | 7. | *after* affects *dele* comma |
| 247. | 24. | *read* the lands only: By the, *&c.* |
| | 21. | *after* 1592 *place a* comma |
| 289. | 15. | *for* a *read* no |
| 295. | | *laſt line, dele* " and diſmiſſed the claim." |

*N. B.* N° 114 was decided on the 3d of Auguſt 1753, and N° 168 on the 30th November 1752; but by accident could not be inſerted in their proper places.

# INDEX

OF THE

## PRINCIPAL MATTERS contained in the foregoing DECISIONS.


A

ADJUDICATION. An annualrent-right is carried by an adjudication, adjudging, in general, all and ſundry reverſions, bonds, *&c.* and all other rights, *&c.* granted in favour of the debtor, concerning the lands mentioned in the libel, N° 10. *Blackwood* contra *creditors of Sir Robert Miln*, June 9. 1752.

A decreet of adjudication pronounced by a ſheriff, of an heritable bond, containing warrant for infeftment in lands without his ſhire, found null, N° 114. *Hyſlop* againſt *Richardſon*, Aug. 3. 1754.

An adjudication mentioning lands only, found to convey mines from an heritor who had obtained a charter of mines in the terms of the act 1592, in competition with a creditor, who had adjudged the mines *per expreſſium*, N° 167. *Ouchterlony* againſt *Selkirk*, Nov. 28. 1755.

Adjudgers, year and day after the firſt adjudication on which infeftment has followed, cannot acquire any preference by taking infeftment, but are preferred according to their dates, N° 180. *Creditors of Tulloch*, Jan. 27. 1756.

An adjudication proceeding upon a charge to enter againſt perſons who were heirs of line or conqueſt, but not the heirs of inveſtiture, found null, N° 196. *Earl of Selkirk* contra *Dalrymple*, March 3. 1756. *See* Proceſs, N° 155.

ALIMENT. One who does not ſucceed as heir to his father, is not bound to aliment his ſiſter, N° 97. *Anderſon and Gibſon* contra *Gibſon*, Jan. 25. 1754.

One who ſucceeds to an eſtate as heir of entail, and does not otherwiſe repreſent his father, is not liable for aliment to his brothers and ſiſters, N° 176. *Malcolms* contra *Malcolm*, Jan. 16. 1756.

A mother alimenting an idiot ſon, who had no eſtate, for 30 years, was found to have no claim againſt an eſtate to which the idiot afterwards ſucceeded, for the aliment furniſhed during theſe years, N° 195. *Drummond* contra *Stewart*, March 2. 1756.

ANNUALRENT. Annualrent found due to children on a proviſion in a contract of marriage, from the firſt term after their father's death, in reſpect the father was bound to employ on annualrent, N° 12. *Ouchterlonies* contra *Ouchterlony*, June 12. 1752.

A factor liable for intereſt upon rents uplifted by him, from the time that his conſtituent made an extrajudicial demand upon him, by a letter, to clear his accounts. N° 42. *Campbell* againſt *Roſe*, Dec. 6. 1752.

Annualrent found due to a merchant, from the term of payment ſpecified in a miſſive letter, though not promiſing annualrent, but the random expences decerned for, in a decreet of conſtitution, were not allowed, N° 223. *Creditors of Frackafield*, Dec. 14. 1756.

APPRENTICE. No action lies upon a bill accepted for payment of an apprentice-fee, the indenture, which was the cauſe of granting the bill, being void by 8*vo Annæ*, N° 98. *Donaldſon* againſt *Fulton*, Feb. 14. 1754.

ARRESTMENT. Arreſtment laid in the hands of a purchaſer, is preferable to a prior arreſtment laid in the hands of a perſon employed to ſell the goods, and actually ſelling them, without mention of the name of the owner, and taking a bill for the price, payable to himſelf, N° 5. *Dunlop* contra *Jap*, Feb. 21. 1752.

An arreſtment uſed in the hands of the truſtees of the debtor to the common debtor, whereupon decreet of forthcoming was taken againſt the conſtituent, found not good, N° 44. *Campbell* contra *Faikney*, Dec. 12. 1752.

Arreſtment effectually looſed on caution, tho' letters of looſing were not intimated to the arreſter, N° 83. *Eliſabeth Borrowman, ſupplicant*, July 28. 1753.

A perſon who was infeft in his debtor's eſtate upon an heritable bond, aſſigned that ſecurity to one from whom he borrowed a leſſer ſum. The apparent heir of the proprietor of the eſtate, brought it to ſale, on the act 1695, and arreſtments were uſed in the purchaſer's hands by the creditors of him who had aſſigned the heritable bond, in order to affect the annualrents thereof: But he having afterwards conveyed the bond to another creditor, it was found, that the ſecond diſponee was preferable to the arreſters, as to the re-

version of the heritable bond and annual-rents, after payment of the first disponee, N° 157. *Ranking of Bonjedward's creditors*, July 9. 1755.

A power from a bankrupt to a trustee, to sell his effects for behoof of his creditors, being executed; arrestment found not competent in the hands of the trustee, so as to disappoint the *pari passu* preference of the creditors, N° 178. *Souper* contra *the creditors of Smith*, Jan. 23. 1756. *Vide* Compensation, N° 208.

B

BANKRUPT. A person insolvent and under diligence by horning and caption, was apprehended by a messenger, but discharged on payment; this was not found equivalent to imprisonment, in the sense of the act 1696, N° 13. *Creditors of Woodston* contra *Colonel Scot*, Feb. 18. 1755. This was reversed on appeal.

BARON-BAILIE. If a person has taken the oaths, and registrate a certificate thereof, in terms of 20*mo* *Geo.* II. *cap.* 43. as baron-bailie to one baron, he is not obliged to qualify and register a second time, upon being appointed baron-bailie to another baron in the same county, N° 67. *Bruce* against *French*, Feb. 20. 1753.

BILLS of EXCHANGE. A husband, when on deathbed, delivered two bills, indorsed blank, to his wife, saying, she would be content now; found, that this was an absolute donation, and that the bills were properly conveyed to the wife, N° 62. *Barbour* and *Blackwood* against *Hair*, Feb. 8. 1753.

*N. B.* "This case stated under bills of exchange, on account of the case; *Weir* contra *Parkhill*, mentioned under that head in the dictionary."

A bill being drawn on two persons, the one as principal, the other as cautioner, conjunctly and severally; action lies, upon the bill, against him who accepted specifically as cautioner, N° 93. *Gilson* against *Campbell*, Nov. 27. 1753.

No action lies upon a bill of exchange which has lain over for thirty years, N° 100. *Lookup* contra *Crombie*, Feb. 20. 1754.

When a bill of exchange is not duly presented for acceptance, no recourse lies against the indorser, although in this case the porteur contended, that the intended accepter had not value of the drawer's in his hands, and that he would not have accepted the bill, even if it had been duly presented; and that the indorser did not suffer any prejudice from the undue negotiation, N° 154. *Hart* against *Glasford*, June 21. 1755.

BONA ET MALA FIDES. Whether the possession of teinds was *bona* or *mala fide*, N° 36. *Blair* contra *Scot*, Nov. 24. 1752.

BURGH ROYAL. The magistrates and town-council of a royal borough, not erected into a barony, may not prohibit the importation of ale into the borough, N° 25. *Millar* against *Clunie*, &c. July 7. 1752.

Freemen and burgesses of royal boroughs carrying on a salmon-trade, may employ unfreemen, in making their salmon-barrels, within the borough, N° 26. *Coopers of Perth* against *Keir and Company*, July 8. 1752.

One declared, by a sentence of the court of session, incapable of being a judge, may, notwithstanding thereof, be a counsellor of a borough, N° 74. *Bucknay* against *Ferrier*, March 10. 1753.

Elections for filling up vacant places in town-councils of boroughs, made by ordinary meetings of council, cannot be tried by summary complaint, upon 16*to* *Geo.* II. *cap.* 11. which relates only to annual elections, N° 102. *Glass and others* contra *the magistrates of St Andrew's*, Feb. 28. 1754.

In a process for reducing an election of one set of magistrates and counsellors, and for declaring the election of another, all persons who are, or pretend to be members of the council, must be made parties to the process, either as pursuers or defenders, in the principal summons, and it is not sufficient to call them by an incident diligence, N° 140. *Gilles* contra *Wauch*, Feb. 18. 1755.

Found, that the act 5. parl. 1672, does not give to royal boroughs a right of using general arrestments in the hands of unfree traders without the borough, and of calling them to depone, in a forthcoming, as to the quantity which was in their hands, but that they must arrest the *ipsa corpora* of unfree goods, N° 189. *Inhabitants of Stromness* contra *the borough of Kirkwall*, Feb. 24. 1756.

Mantua-makers may exercise their calling in a royal borough without being free of the corporation of taylors, although that corporation have the exclusive privilege of making all kinds of taylor-work, N° 219. *Taylors of Perth* against *Lyon*, &c. Dec. 10. 1756.

C

CAUTIO JUDICIO SISTI ET JUDICATUM SOLVI. Caution *judicio sisti et judicatum solvi*, can be exacted before the Admiral's court only in maritime causes, N° 123. *Rowand* contra *Freeman*, Jan. 9. 1755.

A foreigner is only bound to find caution *judicio sisti*, and not *judicatum solvi*, unless in maritime causes, N° 153. March 7. 1755, *Herries* contra *Lidderdales*.

CLARE CONSTAT (virtual precept of). A charter granted by a superior to the son of the apparent heir to the last vassal, the father being alive, but with the consent of the said apparent heir the father, and infeftment thereon, are not sufficient to vest the feudal right of the lands, even where the apparent heir, consenter, had also a right, by a disposition with procuratory and

and precept, from the laſt heir infeft, N°13. *Landales* contra *Landale*, June 12. 1752.

CLAUSE. The words of a deed diſponing "all lands which ſhould pertain to the "granter at the time of his death, to his "brother's heirs and aſſignees whatſoever," were not found to comprehend a ſubject, to which the granter afterwards ſucceded, that from circumſtances appeared not to have been within the granter's intention, N° 193. *Farquharſon* contra *Farquharſon*, March 2. 1756.

COLLIER. A maſter does not loſe his property in a collier by the collier's being year and day from his ſervice, and in the ſervice of another, N° 117. *Dundas* contra *Macleod*, Nov. 19. 1754.

COMMONTY. The proprietor of a barony is only intitled to a ſhare in a commonty, effeiring to the valued rent of ſuch of his lands as have poſſeſſed the commonty, and not to the valued rent of his whole barony, N° 47. *Moncrieff* contra *Balfour*, Dec. 15. 1752.

COMMUNITY. Private burgeſſes may purſue the magiſtrates and town-council of a royal borough, to account for their adminiſtration of the common good, N° 17. *Anderſon*, &c. againſt *the magiſtrates of Renfrew*, June 30. 1752.

The magiſtrates and town-council of boroughs, may grant feus of the property of the borough, or leaſes of a longer endurance than three years, providing always that the community be thereby benefited, N° 22. *Dean*, &c. againſt *the magiſtrates of Irvine*, July 3. 1752.

A village was erected by charter into a borough of barony, with power to the baron to levy certain tolls, and to apply them to the uſes of the borough, the tolls having been conſtantly levied, this was found to import an obligation to apply, although the clauſe had been omitted in the baron's charters for more than a century paſt, N° 138. *Jaffray* againſt *Duke of Roxburgh*, Feb. 18. 1755. This was reverſed on appeal.

COMPENSATION. A debtor having lent money to his creditor, on bond, and continuing to pay the annualrents of the debt which he owed, without deducting the intereſt of the ſum he had lent, may, notwithſtanding, plead compenſation upon that ſum, in a competition with creditors, N° 85. *Haldane* contra *Duke of Douglas*, July 31. 1753.

Tenants who had paid to their maſter, and were decerned to repay to the creditor-arreſter, having continued to poſſeſs for ſubſequent years, and theſe ſubſequent rents being arreſted, the tenants were not found intitled to plead retention againſt the ſaid arreſters, on account of the debt which became due to the tenants by the maſter, upon account of the double payment, which they had made of the rents attached by the firſt arreſters. Here the ſecond arreſtment was prior to the ſecond payment of the former rents, N° 208. *Miller* contra *Meldrum*, July 10. 1756.

COMPENSATION and RETENTION. Retention is competent againſt an adminiſtrator in England purſuing in Scotland, for a debt due to the deceaſed, upon account of counter-claims againſt the deceaſed; but is not competent againſt ſuch adminiſtrator purſuing for a debt due to herſelf, *Mrs Burroughs* contra *Sir Archibald Grant*, July 11. 1754. The firſt part was reverſed on appeal.

COMPETITION. An infeftment taken for ſecurity of certain debts, which were annuities by bond, referring to a liſt that contained the names of the creditors and their annuities, but the endurance of each annuity was only qualified by the bonds, found not to ſubliſt ſo as to ſecure theſe debts in competition with a poſterior adjudication, where, after the date of the infeftment, the original bonds were delivered up and concelled, and in their place new bonds taken for the ſame ſums, N° 16. *Duke of Norfolk* contra *the truſtees of the York-buildings company*, June 13. 1752.

D

DEATHBED. One cannot on deathbed exerce a faculty of burdening his eſtate with a ſum of money for proviſions to children, although the faculty be contained in a deed executed in *liege pouſtie*, N° 136. *Forbes* contra *Lord Forbes*, Feb. 12. 1755. This was reverſed on appeal.

What is a ſufficient proof of death-bed in a perſon who had been long confined to bed, N° 183. *Primroſe* contra *Primroſe*, Jan. 28. 1756.

DEBTOR and CREDITOR. A co-obligant in a bond, is intitled to demand from the creditor, a conveyance to any collateral ſecurity which the other co-obligant has granted to the creditor, N° 10. *Blackwood* contra *the creditors of Sir Robert Miln*, June 9. 1752.

DOVECOTE. He who has more than ten chalders of yearly rent, is not reſtrained, by act 19. par. 22. James VI. from erecting more than one dovecote, N° 23. *Brodie* againſt *Gordon*, July 3. 1752.

E

EXECUTION. Objections to the execution of an inhibition repelled, N° 10. *Blackwood* contra *the creditors of Sir Robert Miln*, June 9. 1752.

An execution of a ſummons mentioning that the witneſſes ſubſcribed the ſame, but not expreſsly bearing, that they were preſent, when the citation was given, was ſuſtained, as ſufficiently implying the preſence of the witneſſes, N° 29. *Clerk* contra *Waddel*, July 17. 1752.

In

In a ranking and sale, the objection sustained, that the common debtor was cited under a wrong Christian name, although he was so particularly designed as to his profession and quality, that *constabat de persona*, No 79. *Dalgleish* against *Hamilton*, July 6. 1753.

It having been objected, that the execution of an inhibition was null, for that it bore, that a copy was fixed upon the door of the debtor's house, after the messenger had made six knocks, *because he could not get the debtor personally*, which method of execution is authorised by law only, when access cannot be got, or the servants refuse to receive the copy; the objection was repelled, No 216. *Gory* against *Donaldson*, Dec. 16. 1756.

EXECUTOR. Commissaries are obliged to give out confirmations of a part of the defunct's effects, if the nearest of kin apply for them, and cannot insist, that full inventories be made up, No 88. *Brodies* contra *Stephen*, Aug. 10. 1753.

General disponees, although not named executors, are intitled to the office of executor, preferable to the defunct's nearest of kin, No 125. *Earl of Crawford* contra *Mary Ure*, Jan. 10. 1755.

F

FACTOR. A factor having been appointed for levying rents, but without any agreement as to his salary, the court fixed his salary at 2½ *per cent* of the money uplifted by him, No 42. *Campbell* against *Rose*, Dec. 6. 1752. *See* Annualrent, No 42.

FACULTY. *See* Forfeiture, No 185.

FEES of OFFICE. The executor of a clerk of session has no right to any fees for extracts, *&c.* paid after his death, although he officiated as clerk of the process, No 122. *Finlayson* contra *Murray*, Jan. 7. 1755.

FIAR ABSOLUTE and LIMITED. Found that a mutual substitution in a bond granted by a father to his two daughters, one of whom was married at the date of the bond, under a prohibition to alien *except in a contract of marriage*, could not be disappointed by the married daughter's general disposition, in her prior contract of marriage, of all heritage acquired, nor by her posterior gratuitous alienation to her husband, No 34. *Macreadie* contra *executors of Macfadzean*, Nov. 15. 1752.

A mutual substitution in a settlement made by an aunt to her two nieces, failing issue of their bodies, containing an express prohibition not to alter or prejudge the order of succession, doth not bar alienation in a contract of marriage, No 37. *Weir* contra *Drummond*, Nov. 28. 1752.

In bonds of provision to children, a simple substitution of one child to another, does not bar gratuitous alienation. Here the bond of provision came in place of a provision in a contract of marriage which contained no substitution, No 51. *Wauchop* contra *John Gibson*, Dec. 22. 1752.

A clause of entail, impowering the heir of tailzie to provide wives or husbands in liferent, to the extent of a third, found sufficient to impower the first institute and the next apparent heir jointly, to settle a third upon the wife of the said next apparent heir, although the said apparent heir, after surviving the first institute, never completed his titles to the estate, No 182. *Houston of Johnston* contra *Nicolson of Carnock*, Jan. 28. 1756.

A prohibition upon a first institute to sell or contract debts, or to do any other deed, whereby the lands might be affected, was found to imply a prohibition to alter the course of succession, No 205. *Mary Ure* contra *the Earl of Crawfurd*, July 17. 1756.

FORFEITURE. By the law of England, now the law of Scotland, as to treason, the husband's right, in consequence of the marriage, to receive the profits of lands liferented by the wife, accrues not to the crown, by his forfeiture, when he is attainted of high treason, and thereafter pardoned as to his life, with condition of being transported for life, and that transportation confirmed by act of parliament, No 64. *Farquhar* against *his Majesty's Advocate*, Feb. 10. 1753.

The accumulation of interest in an adjudication so as to make it bear interest, held to be no penalty, No 107. *Mackenzie* against *his Majesty's Advocate*, March 9. 1754. This decree was reversed on appeal, but on a different ground.

A father took a charter of lands to himself in liferent, and to his son *nominatim* in fee, whom failing, to certain substitutes; he reserved power of disponing the lands; on this charter infestment was taken; after the son's death, the father executed his reserved faculty, by disponing the lands to his grandson, whom failing, to the same substitutes as formerly; the grandson was forfeited; the widow of the son found not intitled to a terce of the lands, No 185. *Cuming* against *his Majesty's Advocate*, Feb. 10. 1756.

An attainted person's issue, born abroad, which would have been inheritable and not aliens, had there been no attainder, are considered as natural subjects, so as to continue the crown's right, by the father's forfeiture, to lands entailed, in competition with an heir in remainder, although such issue are excepted, by the *4to Geo.* II. *cap.* 21. from the benefit of *7mo Anne, cap.* 5. naturalising the issue of subjects born abroad, No 3. *Capt. Gordon* contra *his Majesty's Advocate*, Feb. 18. 1752. This was reversed on appeal.

Forfeiture of the father and the only son, where the estate is entailed to heirs-male, excludes

excludes the provisions made in a contract of marriage in favour of daughters, "failing heirs-male of the marriage, who "should succeed to and enjoy the estate," even though the son predecease the father. Forfeiture also excludes bonds of provision to younger children containing a power of revocation, and never delivered, No 30. *Oliphant* contra *his Majesty's Advocate*, July 23. 1752.

An estate found to be carried by forfeiture from the whole substitutes of an entail, where the tailzie was not recorded, and contained no clause, irritating the contravener's right, or prohibiting to sell, the forfeiting person being apparent heir to the entailer, and having done no deed acknowledging the entail, No 63. *Hay* contra *his Majesty's Advocate*, Feb. 9. 1753.

The condition, *si sine herede masculo decesserit*, is disappointed by the existence of a son, though he outlived the father but two months, No 101. *Dorothea Primrose* contra *his Majesty's Advocate*, Feb. 26. 1754.

Witnesses admitted to prove that a bill, dated Aug. 28. 1745, and accepted by a forfeiting person was granted for an old debt, No 103. *Duncan* contra *his Majesty's Advocate*, Feb. 28. 1754.

Bonds of provision when set up as claims upon the estates forfeited to the crown, are not good unless the delivery is proved, No 119. *Alexander Fraser* contra *his Majesty's Advocate*, Dec. 10. 1754.

Cautioners for a forfeited person are not intitled to claim, against the crown, the expences laid out in prosecuting their relief against the forfeited estate, No 191. *Baillie* contra *his Majesty's Advocate*, Feb. 26. 1756.

A personal faculty of redeeming lands competent to the forfeiting person, does not fall to the crown by his forfeiture, No 197. *Forbes* contra *his Majesty's Advocate*, March 9. 1756. This reversed on appeal, but on a different ground.

A loyal person from whom a rebel carried away goods during the rebellion, has no claim for the value of these goods out of the rebel's effects belonging to the crown, No 211. *Leith* contra *his Majesty's Advocate*, July 28. 1756.

FOREIGN. The assignees under a commission of bankruptcy awarded in England, against a native of Scotland who had fixed his residence in England, are preferable from the commencement of their right as to debts owing to the bankrupt, if contracted after the English form, or payable in England, though due by persons in Scotland, or natives of Scotland, in a competition with the bankrupt's creditors doing diligence by arrestment in Scotland, No 133. *Bradshaw and Ross* contra *Fairholm and others*, Feb. 1. 1755.

Execution is not granted upon a decreet pronounced in a foreign country, if it appears the decreet was iniquous, No 173. *Wilson* contra *Brunton*, Jan. 7. 1756. This reversed on appeal, the respondent not appearing.

FORUM COMPETENS. The proper commissariot for confirmation of goods of a deceased Lord of Session, which are at his country-seat, is the commissary of that district, and not the commissary of Edinburgh, No 47. *Hall* contra *Macaulay*, Jan. 19. 1753.

FRAUD. A merchant in Scotland, after having made a *cessio bonorum*, began a new trade; he commissioned and received goods from a merchant in foreign parts, who knew not of this *cessio*. In a competition between former creditors and the foreign merchant, the latter was preferred, and the property was found not transferred by delivery, No 6. *Forbes* contra *Mains*, Feb. 25. 1752.

A sale made at a roup to a white bonnet is void, and he who was the next highest offerer will be preferred, No 87. *Gray* contra *Stewart*, Aug. 7. 1753.

The master of a ship which was run ashore, fraudulently purchased, by a trustee, the wreck at a collusive roup, and at an underrate; he afterwards sold it upon considerable profit to the said trustee, and took a bond for the money, which he assigned for value. The insurers of the ship were preferred to the sum in the bond, preferable to the assignee, on account of the fraud of his cedent: But action was reserved to the assignee against the trustee, as *particeps fraudis*, that he might be found liable to pay the sum a second time to the assignee, No 152. *Irvine* contra *Osterby* and *Gildart*, March 6. 1755.

FREEHOLDERS, ROLL OF. Valuation not legally divided, except at a meeting of the commissioners upon the day mentioned in the act, or by adjournment, or when summoned by the convener, No 68. *Col. Abercrombie* contra *William Leslie*, Feb. 21. 1753.

One having right to lands valued in the cess-books at l. 400, is intitled to vote, altho' he has not an heritable right to the teinds of these lands, No 71. *Scot* contra *Sutherland*, March 3. 1753.

A liar's right of his lands being revocable and merely nominal, a discharge of the power of revocation granted after his death to his apparent heir, will not give such heir a title to be inrolled as a freeholder upon his apparency, No 78. *Abercrombie* contra *Gordon of Ardmeallie*, July 3. 1753.

A retour of lands holden of a subject, is sufficient evidence of the old extent, No 82. *Abercrombie* contra *Baird of Auchmedden*, July 26. 1753.

The division of the valuation of lands made by a meeting of the commissioners of supply, not called by the convener, does not intitle one to be added to the roll of free-

holders, not being a legal diviſion, N° 96. *Cuningham* contra *Stirling*, Jan. 9. 1754.

The claim for being inrolled, which muſt be lodged with the ſheriff-clerk, need not mention the preciſe ſum at which the lands were valued, N° 97. *Grant* contra *Leith*, Jan. 16. 1754.

A wadſet of a ſuperiority, where the wadſetter took the hazard only of the feu-duty, and of ſome ſmall rent, was found a proper wadſet intitling to a vote, N° 104. *Campbell* contra *Stirling*, March 6. 1754.

What a legal diviſion of the valuation, *ibid.*

What ſufficient poſſeſſion, ſo as to intitle to vote, *ibid.*

A right of ſuperiority of lands intitles to a vote, although the charter contained an obligation to rediſpone the property, reſerving an yearly reddendo of a ſmall ſum, and taxing all the caſualties of ſuperiority to ſmall ſums, N° 124. *Forreſter* contra *Fletcher*, Jan. 9. 1755.

Reſerved powers over a fee, muſt be diſcharged and renounced, and the renunciation regiſtrated one year before the liar be intitled to vote, N° 126. *Dundas* contra *Craig*, Jan. 17. 1755.

An heir, by being entered, does not loſe the privilege competent to him by act of parliament, of being inrolled and voting in right of his predeceſſor's titles, N° 127. *Galbraith* contra *Cuningham*, Jan. 17. 1755.

A wadſet is a proper wadſet, and intitles to vote, although there be no clauſe in it, impowering the wadſetter to call for his money, *ibid.*

A diviſion of the valued rent ſuſtained, though proceeding upon a proof of the uſe of payment of ceſs by the vaſſals of the lands, *ibid.* and N° 128. *Campbell* contra *Campbell*, Jan. 17. 1755.

A right to the feu-duties payable out of church-lands, does not intitle the proprietor of the feu-duties to vote for a member of parliament, *ibid.* and N° 129. *Buchanan* contra *Cuningham*, Jan. 17. 1755.

It is ſufficient to intitle a freeholder to vote, that his ſeiſin be regiſtrated one year before the meeting for election, although it be not regiſtrated one year before the teſt of the writs for calling the parliament, *ibid.*

If a freeholder be inrolled upon an erroneous diviſion of the valuation of his lands, it is not ſufficient to ſupport his inrolment, that, by an after diviſion, it appears his lands were truly above 400 l. of valued rent, N° 130. *Callendar* contra *Bruce*, Jan. 17. 1755.

If the diviſion of the valuation of lands made by a general meeting of the commiſſioners of ſupply appear *ex facie* to be regular, it cannot be ſet aſide by exception, although the objector offer to prove, that the diviſion was improperly made, a full proof of the real rent of the lands originally valued *in cumulo* not being taken, N° 141. *Forreſter* contra *Preſton*, Feb. 18. 1755.

Lands mortified with a reddendo of *preces et lachrymæ*, give a title to vote for a member of parliament, N° 146. *Dalrymple and others* contra *Sir James Reid*, March 4. 1755.

An apparent heir is intitled to be inrolled as a freeholder, although the predeceſſor had diſponed the lands, with procuratory and precept, if the diſponer has diſcharged the procuratory, and granted obligation not to become the crown's vaſſal during the apparent heir's life, N° 149. *Murray* contra *Neilſon*, March 5. 1755.

A writing dated in the 1554 bore, that an inquiſition was made before the ſheriff of Edinburgh, by certain perſons therein named, who ſaid upon oath, that the valuation of the reſpective lands in that county amounted to certain ſums of old extent. This writing concluded with theſe words, *In cujus rei teſtimonium*; it did not bear that the ſeals of the jurors were appended, nor the name and ſubſcription of the clerk. Being produced from the chancery, it was found to be authentic evidence of the old extent, N° 163. *Chalmers* contra *Titler*, Nov. 19. 1755.

Found that the convener of the commiſſioners of ſupply is intitled to call an immediate general meeting, upon proper application to him, notwithſtanding of an adjournment made by the commiſſioners to a diſtant day, N° 222. *Sir Robert Gordon and other ſupplicants*, Dec. 14. 1756.

FUNERAL-CHARGES. Mournings to ſuch as muſt be preſent at the funeral, are to be conſidered as a privileged debt, but not articles neither uſed at nor before the interment, N° 57. *Hall* contra *Macaulay*, Jan. 19. 1753.

G

GAME. Dogs, guns, and nets, may not be apprehended *brevi manu* in virtue of the 13th act, 1ſt parl. *Annæ*, N° 58. *Gregory* againſt *Wemyſs*, Jan. 23. 1753.

GLEBE. A miniſter of an united pariſh who has three glebes, each below the legal ſtandard, but taken together above it, and alſo ſufficient for graſing a horſe and two cows, is not intitled to an additional deſignation, either of arable land or graſs, N° 165. *Forbes* contra *Millar*, Nov. 26. 1755.

The graſs-mail to which a miniſter is intitled by act 1663, *Cha.* II. is payable by the heritor of the neareſt kirk-lands, but he has proportional relief from the other kirk-lands in the pariſh, N° 171. *Dury* and *Black* contra *Thomſon*, Dec. 12. 1755.

Found, that, in virtue of the act 21. parl. 1663, ground may be aſſigned to a miniſter for graſs, though it has been in uſe of being ploughed up for three years, and lying

ing in graſs for three years ſucceſſively, No 192. *Hodges* contra *Bryce*, Feb. 27. 1756.

H

HERITABLE AND MOVEABLE. An aſſignation of a liferent-right falls to the heir of the aſſignee, and not to the executor, No 39. *Ewing* againſt *Drummond*, Nov. 29. 1752.

HEIR APPARENT. The executor of an apparent heir was preferred to the next heir entering, as to the annualrents of an heritable ſum which fell due during the apparency, N 181. *Houſton of Johnſton* contra *Nicolſon of Carnock*, Jan. 23. 1756.

HIGHWAYS. Juſtices of the peace may apply the whole ſtatute work within the county for the reparation of one highway, and may permit thoſe who live at a diſtance from ſuch highway, to compound at a rate below the ſtatutory compoſition, No 99. *Viſcount of Arbuthnot, &c.* againſt *juſtices of Kincardine*, Feb. 15. 1754.

Colliers, gateſmen, windleſſmen, and watermen, are not comprehended under the acts of parliament which require labouringmen to repair the highways, No 150. *Earl of Eglinton* contra *juſtices of Air*, March 5. 1755.

HOMOLOGATION. Acts of homologation after majority, of a deed done by tutors, ſuſtained to bar the minor from reducing, where the acts ſeemed to imply the minor's knowledge of the deed homologated, No 169. *Sir Thomas Hay* contra *James Kilgour*, Dec. 5. 1755.

HORNING. No horning competent upon a decreet of the baron bailie of Leith, No 76. *Cormack* contra *Roger*, June 16. 1753.

A horning is not competent upon a decreet pronounced by the juſtices of peace, No 198. *Stevenſon* contra *Barclay*, March 9. 1756.

HYPOTHEC. *See* Priſoner, No 28.

HUSBAND AND WIFE. A promiſe of marriage followed by a *copula*, makes a lawful marriage *de præſenti*, and the after marriage of either of the parties, though openly made, will be void, No 46. *Pennycook* and *Grinton* contra *Grinton* and *Graite*, Dec. 15. 1752.

I

IMPLIED OBLIGATION. A purchaſer became bound to pay to a creditor, upon the eſtate purchaſed, a certain ſum, upon his granting a ſufficient conveyance of his debts; one of theſe debts was an adjudication led by a third party, and a charge given to the ſuperior upon it, which had been paid by this creditor; but in place of a conveyance, a diſcharge had been taken, and the adjudication, with the grounds of it, and the diſcharge, were loſt; the creditor was ordained to raiſe an improbation in name of the purchaſer againſt the adjudication, to diſburden the eſtate thereof, before payment, No 110. *Macdonald* contra *Macpherſon*, July 2. 1754.

A maſter found liable for medicines furniſhed to his ſervant with his knowledge, No 160. *Sir Andrew Mitchel* contra *Gainer*, July 23. 1755.

*See* Succeſſion, No 204.

IMPLIED DISCHARGE. An obligation in a contract of marriage, that a wife ſhould pay a ſum yearly out of her jointure *to the heir-male of the marriage, and to the heir-male of his body allenarly*, was not found to import a reſtriction of the liferent, ſo as to increaſe the defunct's *hereditas jacens*, affectable by creditors; and the heir male was found to have right to the ſaid ſum without repreſenting his father, No 177. *Creditors of Kinminity*, Jan. 20. 1756.

IMPOST. Impoſt granted to the town of Edinburgh, is payable on wines, *&c.* imported within the limits of the grant, tho' for private conſumpt, No 53. *Tackſmen of the town of Edinburgh's impoſt* againſt *Sir Robert Myreton*, Dec. 26. 1752.

IMPROBATION. In a proceſs of reduction and improbation brought by a creditor, together with his ſummons of ſale, it is competent for the creditor to inſiſt for reduction of a tack of part of the bankrupt's eſtate, if the tenant, who is called as a defender, appear in the proceſs, and produce his tack, though certification would not have paſſed againſt the tack for non-production, No 14. *Creditors of Edward Murray* contra *Gideon Murray*, June 13. 1752.

In a criminal proſecution againſt one for the forgery of a deed, it is not neceſſary to produce the deed ſaid to have been forged, the crime libelled being the *corpus delicti*, No 60. *Duke of Roxburgh* contra *Chatto*, Feb. 6. 1753.

Trial for forgery allowed to proceed, though the writs alledged to be forged were loſt or amiſſing, No 115. *His Majeſty's Advocate* contra *Cameron*, Aug. 9. 1754.

INDEMNITY. An officer of the army ſeizing, during the rebellion, a perſon's goods who is ſuſpected of being concerned in the rebellion, and on that account made priſoner, and diſpoſing of theſe goods for the uſe of the army, is by the acts of indemnity 19. *Geo.* II. freed from all action at the inſtance of the proprietor, though he was diſmiſſed from priſon without being brought to a trial, No 8. *Strachan* contra *Lieutenant Maclauchlan*, Feb. 26. 1752.

INDUCIAE LEGALES. The objection to an adjudication, that the ſummons was executed before the days of ſpecial charge were elapſed, is relevant to poſtpone it to ſuch adjudications as were regularly led upon ſpecial charges, No 27. *Repreſentatives of Couper* againſt *the creditors of Skelbo*, July 9. 1752.

JURISDICTION. Juſtices of peace are competent judges in a proceſs againſt the author of a defamatory libel, which reflected on one of their number, for words uttered by him at a quarterſeſſion, and contained threatenings to break the peace, No 1. *Dundas* againſt *Bell*, Feb. 4. 1752.

Tolls levied in virtue of an act of parliament, by the bailie of the regality of Dalkeith, for certain uſes, muſt, after the act 20*mo Geo.* II. be levied by the baron-bailie of that family in whoſe favour the regality had been erected, he being the only magiſtrate now remaining within the territory, No 20. *Brigs, &c.* againſt *Duke of Buccleuch*, July 1. 1752.

A ſheriff has not power to judge in queſtions relating to the building of houſes within borough, but the dean of guild only, No 45. *Magiſtrates of Stirling* contra *the ſheriff-depute*, Dec. 14. 1752.

The act 24*th Geo.* II. *cap.* 44. limiting the endurance of actions againſt juſtices of the peace, extends to Scotland, No 94. *Duke of Douglas* contra *Lockhart of Lee*, Dec. 18. 1753. This was reverſed by the houſe of Lords.

The words of the act 18*th Geo.* I. impowering juſtices of the peace to hear and finally determine and adjudge offences in deſtroying trees and planting, do not exclude the court of ſeſſion from a power of review, No 108. *Buchanan* contra *Towart*, March 10. 1754.

Juſtices have no power of warding for civil debts, No 91. *Blaw* contra *Geddes*, July 9. 1754.

An eſtate ſtrictly entailed having been ſequeſtrated by the court of ſeſſion, their Lordſhips ordered leaſes thereof for nineteen years to be made, the heir of entail offering no objection, No 135. *Mr Neil Campbell, &c. ſupplicants*, Feb. 12. 1755.

A proceſs of damages for a verbal injury is competent before the court of ſeſſion, No 147. *Auchinleck* contra *Gordon*, March 4. 1755.

*See* Tailzie, No 19.

K

KING. The King has no preference upon land-eſtates by adjudication for revenue-debts; but other adjudgers within year and day are intitled to be ranked *pari paſſu* with him, No 102. *Creditors of Burnet* contra *James Murray*, July 17. 1754. *See* Patronage, No 106.

A perſon forfeited in abſence for high treaſon by the parliament of Scotland, obtained from Queen Anne a pardon, and a gift of his eſtate, which never paſſed the ſeals; he lived in full poſſeſſion of his eſtate, was admitted to ſue and to defend in the ſupreme courts; and alſo acquired right to certain adjudications affecting the eſtate. He incurred forfeiture a ſecond time. King George I. made a gift of this eſtate to the ſiſter of the forfeited perſon, revocable at pleaſure. She conveyed it to truſtees, redeemable by the forfeited perſon for an eluſory ſum, whenever he ſhould be pardoned. He was pardoned, and reſumed the poſſeſſion, but did not redeem. Afterwards he entered into rebellion, and the crown revoked the gift. They who had become his creditors ſince his firſt forfeiture were found to have no title in law to claim payment of their debts, either out of the eſtate or to the extent of the adjudications acquired by him, and their plea of *bona fides* was repelled, No 172. *Creditors of Strowan* contra *his Majeſty's Advocate*, Dec. 17. 1755.

L

LEGACY. A legacy left, after ſeveral others, in theſe words; "and the remaining "*L.* 600, reſidue of the ſaid *L.* 1600, I "bequeath to A. B." A deficiency having happened of the total fund, this was found not a reſiduary legacy, but a ſpecial legacy, and the legatee intitled to draw proportionally with the other legatees, No 188. *Arbuthnot* contra *Arbuthnot*, Feb. 13. 1756.

LIFERENTER. A liferenter's right as to a *ſylva cædua*, or to whatever is held *pars ſoli*, determines with his death, No *Lang* and *Croſs* contra *the executors of the Counteſs of Forfar*, Dec. 21. 1752.

If a liferenter repair a ruinous ſubject liferented, ſhe will have repetition of the whole expence at the end of the liferent, No 184. *Da. Scott* contra *Phœbe Forbes*, March 5. 1755.

A perſon getting the liferent of a houſe, and of the furniture of that houſe, cannot remove the furniture, but muſt uſe it in that houſe only, No 161. *Cochran* contra *Cochran*, Aug. 7. 1755.

M

MINOR. Furniſhings by a curatrix to a minor beyond the intereſt of his patrimony, ſuſtained as an article of diſcharge to the curatrix, where the minor was of a noble family, and the intereſt of his portion too ſmall to ſupport him according to his rank, and not preſumed to be advanced *animo donandi*, No 170. *Ducheſs of Gordon* contra *his Majeſty's Advocate*, Dec. 12. 1755.

MOVEABLES. *See* REI VINDICATIO, No 33.

MUTUAL CONTRACT. The executors of a wife, after her deceaſe, were not found intitled to reduce an aſſignation made to her huſband, after the marriage, of her tocher, though they proved that the huſband had no funds, and had become bound to her and the children for 9000 merks, No 158. *Telfer's aſſignees* contra *Niſbet*, July 14. 1755.

N

NATURALIZATION. Naturalization by virtue of the 7th Anne, *cap.* 5. is not withheld, by the 4th George II. *cap.* 21. from the children born abroad of felons, but only from those children whose father is made liable to felony in case of returning to Great Britain without licence, No 3. *Captain Gordon* contra *his Majesty's Advocate*, Feb. 18. 1752.

See *Forfeiture*, No 3.

P

PACTUM ILLICITUM. No action lies on a bond, for a sum of money granted on condition, that the granter of the bond obtain his Majesty's pardon for all crimes and misdemeanors by him committed, No 9. *Archibald Stewart* against *the Earl of Galloway*, June 3. 1752.

A bond taken payable, when the granter shall succeed to another person's estate, is null upon turpitude. Avisandum, as to repetition of the sum advanced by the creditor in the bond, No 61. *Sir Michael Stewart* contra *Earl of Dundonald*, Feb. 7. 1753.

PAPIST. A person who had professed herself a nun, was not found to have forfeited her right to a bond, so as to give right to her nearest of kin to claim payment, No 155. *Mary Collins* contra *Lord Boyd*, July 2. 1755.

If one take an estate to himself in liferent, and to his son a Papist in fee, and infeftment follows thereon, the Protestant heir may insist to be served whenever the liferent-right ceases, No 187. *Brebner, &c.* against *Law*, 12th February 1756.

The formula prescribed by act 1700, must be taken by a Papist residing in foreign parts, by authority of the British privy council; the privy council for Scotland being abolished by 6th Anne, No 187. *Brebner, &c.* against *Law*, Feb. 12. 1756.

PASSIVE TITLE. A person granting a bond, binding himself and his heirs in a certain subject, if he makes up no titles to that subject, nor possesses it for three years, and his heir serves as to that subject to a remote predecessor, but represents the granter in other subjects, the obligation will still be valid against him to affect that subject, No 7. *Lady Jean Scot* against *Duke of Buccleugh*, Feb. 26. 1752.

A wife who had intromitted with the moveables of her husband, in virtue of a disposition *omnium bonorum*, burdened with debts, married a second time. The second husband, after the death of his wife, was not found liable to the creditors of the first husband, beyond the extent of his wife's actual intromissions, No 18. *Annandale* contra *Brown*, June 30. 1752.

An apparent heir's possession, under a gift of liferent of a former heir infeft, is not, during the subsistence of the liferent, accounted as part of the three years possession upon act 1695, *cap.* 34. No 21. *Pitcairn* contra *Lundin*, July 24. 1752.

An apparent heir possessing an estate, without being either served, or having right by adjudication on his own bond, is not liable, on the act 1695, for the debts of the preceding apparent heir, who was three years in possession, No 121. *Grant* contra *Sutherland*, Dec. 12. 1754.

PATRONAGE. A grant by the King of a patronage of a common kirk in 1588, ratified in parliament 1592, erecting the same into a parsonage, found to be good without consent of the chapter and bishop, and to subsist notwithstanding the acts 1606 and 1617, restoring bishops and their chapters, No 15. *Urquhart of Meldrum* contra *Officers of State*, June 27. 1752.

A minister admitted upon a presentation from the patron last in possession, found intitled to the stipend during his incumbency, although another was afterwards found to have a preferable right to the patronage, No 70. *His Majesty's Advocate* against *Dick*, March 2. 1753.

A patronage once united, and passing by infeftment along with lands, cannot afterwards be effectually conveyed without infeftment, No 84. *Urquhart* contra *Officers of State*, July 28 1753.

A seisin of a right of patronage, bearing in general *juris solennitatibus consuetis debite observatis*, was found sufficient, No 84. *Urquhart* against *Officers of State*, July 28 1753.

When the King becomes patron of a church, in consequence of the attainder of the former patron, he is not bound to apply the vacant stipend for pious uses within the parish, No 106. *Heritors of Tayne* contra *Munro*, March 8. 1754.

PEERS. The privilege of a peer, in not being liable to incarceration for a civil debt, belongs also to his widow, No 212. *Macdonald* contra *widow of a peer*, July 28. 1756.

PENALTY. A minute obliging parties to extend a tack on stamped paper under a penalty, but not bearing attour performance, is notwithstanding binding, and cannot be refiled from upon paying the penalty, No 89. *Bromfield* contra *Young*, Aug. 11. 1753.

PERICULUM. A merchant, alledging he had sent certain bank-notes in a post-letter, which was miscarried, his account-book, together with a proof of circumstances by his clerks, and his oath in supplement, were held sufficient to make his correspondent, who had given commission to send the notes in that manner, liable for the loss, No 50. *Cuming* contra *Marshall*, Dec. 21. 1752.

A merchant in Scotland commiſſioned goods from a merchant in Rotterdam, to be ſent by the firſt ſhip to one of three ports in Scotland. The factor ſhipped the goods on board a veſſel bound to Leith, and committed the invoice to the care of the maſter, and tranſmitted to his conſtituent an account-current, wherein he took credit for goods ſent by a certain ſhipmaſter to Leith, as *per* invoice; but neither ſpecified the goods, nor the ſhip: the ſhip having been loſt in its paſſage, the Scotch merchant found liable to pay the price of the goods, N° 113. *Hoog* againſt *Kennedy*, 24th July 1754.

PERSONAL and TRANSMISSIBLE. A leaſe for 45 years, and a life granted to a man, "his heirs, executors, and aſſignees whatſoever, with whom the proprietor ſhall "be content and accept of allenarly," is not aſſignable even in ſecurity of a debt without the proprietor's conſent; nor is he bound to ſhow cauſe for his not accepting of the aſſignee, N° 217. *Anderſon* againſt *Marquis of Tweeddale*, Nov. 24. 1756.

PLANTING and INCLOSING. Three acres and an half adjudged from one heritor to another, in virtue of the act 17. parliament 2. Charles II. N° 121. *Pew* againſt *Miller*, Dec. 14. 1754.

The act 1695 anent run-rig, was found to extend to the diviſion of ſix acres, the property of one heritor, lying together, N° 162. *Heritors of Inveresk* contra *James Milne*, Nov. 13. 1755.

The ſtatute 1695, anent run-rig, was extended to the diviſion of parcels conſiſting of three acres and two acres lying interjected, N° 213. *George Chalmers* contra *Mary Pew*, July 29. 1756.

POLICE. A blackſmith, who had his forge in the ſecond ſtory of a houſe, though vaulted, was decerned to remove at the inſtance of a neighbouring heritor, as a dangerous nuiſance, N° 206. *Kinloch* contra *Robertſon*, June 20. 1756.

POOR. Found that the kirk-ſeſſion has the ſole right of keeping mort-cloths, and letting them out for hire within the pariſh, for the uſe of the poor; and that no others are intitled to hire out mort-cloths, or to lend them, N° 215. *Miniſter and ſeſſion of Kippen* contra *Macclaws*, Aug. 10. 1756.

*N. B.* The ſame deciſion was given in the year 1718, between the kirk-ſeſſion and trades of Kilwinning, but prejudice to private perſons to uſe mort-cloths belonging to themſelves.

POOR'S MONEY. Any of the heritors of a pariſh are intitled to call the kirk-ſeſſion to account for their management of the poor's money, N° 35. *Hamilton* contra *miniſter and ſeſſion of Cambuſlang*, Nov. 23. 1752.

What are proper articles of diſcharge in the kirk-ſeſſion's accounts? *ib.*

PRESCRIPTION. Septennial preſcription of cautionry-obligations does not take place, unleſs there be a clauſe of relief in the bond; or a bond of relief intimated, though the cautionry appear from other circumſtances, N° 10. *Blackwood* contra *Creditors of Sir Robert Miln*, June 9. 1752.

Preſcription of the action of reduction, *ex capite inhibitionis*, runs only from the date of the infeftment, taken contrary to the inhibition, N° 10. *Blackwood* contra *creditors of Sir Robert Miln*, June 9. 1752.

The duty called *ſkat*, having been levied by the crown, and its donatar, from the udalors of Orkney, ever ſince the 1667, without interruption; during all which time the ceſs had been levied alſo; the plea made by the udalors, that ceſs and ſkat are ſynonymous, and that the payment of ceſs exeemed them from paying ſkat, was repelled, N° 21. *E. of Galloway* againſt *E. of Morton*, July 1. 1752.

A perſon poſſeſſing an eſtate for forty years, upon an unlimited title, acquires thereby an unlimited fee, although the eſtate was formerly under limitations; and that the perſon poſſeſſing was alſo the heir of the limited title, N° 59. *Douglas* contra *Douglas*, Feb. 3. 1753.

Preſcription of an account, by the ſtatute of limitations, 21. Jac. I. found to run from the laſt article, N° 65. *Executrix of Wright* againſt *Dickſon*, Feb. 14. 1753.

Contrary uſage for forty years, by poſſeſſing on tacks, containing a different *reddendo*, bars approbation of the reports of the ſub-commiſſioners for valuation of teinds, N° 69. *Earl of Morton* and *Captain Stewart* contra *the Marquis of Tweeddale and officers of ſtate*, Feb. 28. 1753.

Vacant ſtipends fall under the quinquennial preſcription, N° 77. *Gloug* againſt *Macintoſh*, July 3. 1753.

A writer's judicially claiming retention of his conſtituent's writings, until payment of his account, without producing it, does not interrupt the preſcription of that account, N° 92. *Executors of Couper* againſt *Ogilvie*, Nov. 26. 1753.

The act, 24th *Geo.* II. *cap.* 44. limiting the endurance of actions againſt juſtices of peace, extends to Scotland, N° 94. *Duke of Douglas* contra *Lockhart of Lee*, Dec. 18. 1753. This was reverſed on appeal.

A royal borough, having a charter of confirmation ratified in parliament, which contains a general clauſe, *cum omnibus annuis redditibus et poſſeſſionibus quibuſcunque*; and having conſtantly exacted, for upwards of forty years, a toll for every loaded cart paſſing through the liberties of the borough, was found intitled to continue in the poſſeſſion of that toll, N° 116. *Magiſtrates*

*giſtrates of Lauder* contra *Brown*, Nov. 15. 1754.

Minority is deduced from the years of the poſitive preſcription of real rights, N° 118. *Blair* againſt *Shedden*, Dec. 6. 1754.

A village was erected into a burgh of barony, *cum omnibus et ſingulis terris et ſingulis ſuis pertinentiis*; the inhabitants having been in the immemorial poſſeſſion of whitening and drying their linen upon a certain ſpot of ground, being an iſland in the neighbourhood, were found intitled to continue their poſſeſſion, N° 138 *Jaffray*, &c. againſt *D. of Roxburgh*, Feb. 18. 1755. This was reverſed on appeal.

The ſtatute of limitations was not found to run in favour of a perſon who removed to Scotland immediately after granting the note, purſued on, and continued there, N° 156. *Renton's truſtees* contra *Robert Baillie*, July 7. 1755.

A clauſe, *cum decimis*, in a charter of adjudication, which is repeated in ſubſequent charters, does not give right to teinds by the poſitive preſcription, in the perſon of him who continued to take leaſes of the teinds from the crown, the former titular, N° 190. *Straiton* againſt *New College of St Andrew's*, Feb. 25. 1756.

The production of grounds of debt, in order to prevent certification in a proceſs of reduction and improbation, interrupts not the negative preſcription of forty years, N° 199. *Hay* againſt *his Majeſty's Advocate*, March 9. 1756.

A bond being conveyed to truſtees for the uſe of children, according to ſuch diviſions as the truſtees ſhould think fit, not being purſued for during forty-three years, was found to be preſcribed, notwithſtanding the minority of the children, N° 207. *Children of Sir Samuel Maclellan* contra *repreſentatives of Enock*, June 24. 1756.

Found that the minority of the next heirs in ſucceſſion interrupts the preſcription upon titles of abſolute property made up to an entailed eſtate; and that the ſaid minorities may be pleaded by a remoter heir, to whom the entailed ſucceſſion devolved; and that a poſtnuptial contract of marriage was not an onerous cauſe for altering the ſaid entail, N° 214. *Ayton* contra *Monypenny*, July 31. 1756. This was reverſed on appeal, and the plea of preſcription ſuſtained.

*See* Preſumption, N° 159.

*See* Collier, N° 117.

PRESUMPTION. A parcel of cattle being ſtole at one time, he in whoſe cuſtody the hides of part of them are found, not bringing proof how he came by them, is liable for the value of the whole cattle, and for damages and expences, N° 41. *Stewart* againſt *Macfarlane*, Dec. 5. 1752.

A legacy in a ſecond ſettlement is preſumed to include a legacy for a ſmaller ſum contained in a former ſettlement, though not ſo expreſſed, N° 52. *Belches* contra *Sir Peter Hepburn Murray*, Dec. 22. 1752.

Bonds of proviſion, when ſet up as claims upon the eſtates forfeited to the crown, are not good unleſs the delivery is proved N° 119. *Alexander Fraſer* contra *his Majeſty's Advocate*, Dec. 10. 1754.

Phyſicians fees are preſumed paid, except during the laſt ſixty days of the deathbed-ſickneſs, N° 134. *Dr Park* contra *the repreſentatives of Langlands*, Feb. 7. 1755.

The perſon in whoſe poſſeſſion a ſtolen horſe is found, who had taken burgh and hame hold when he bought him, not liable to the owner in the expences of recovering the goods, N° 143. *Macpherſon* contra *James Grant*, Feb. 28. 1755.

The minute of a kirk-ſeſſion, bearing that the defender had acknowledged himſelf the father of a child, though not ſigned by him, but ſupported by the oaths of two members of ſeſſion, and by his owning that he lay with the mother five months before the birth, found ſufficient to ſubject him to maintain the child, N° 145. *Millar* contra *Baird*, March 1. 1755.

A clerk to a ſubmiſſion was found to have no claim for his trouble after three years, unleſs proved reſting owing by writ or oath, N° 159. *Finlayſon* contra *King's Advocate*, July 22. 1755.

Aliment furniſhed by a father to a ſon, preſumed to be *ex pietate*, and not in extinction of annualrents due by the father to the ſon, N° 197. *Forbes* contra *his Majeſty's Advocate*, March 9. 1756.

A deed dated in 1689, the granter whereof was buried four days after its date, was preſumed, *poſt tantum temporis*, to have been executed on deathbed, unleſs the perſon who founded on the deed could prove *liege pouſtie*, N° 201. *Ruddiman* againſt *Merchant Maiden-hoſpital*, March 9. 1756.

PRISONER. Dyvours habit is not diſpenſed with when the bankruptcy is occaſioned by ſeizure of ſmuggled goods, N° 4. *Dryſdale, ſupplicant*, Feb. 20. 1752.

A jailor may not detain a criminal who is under ſentence of tranſportation until payment of the priſon-dues, N° 28. *Rob, ſupplicant*, July 14. 1752.

A priſoner is not intitled to the benefit of the act of grace, who is impriſoned till he perform a palinode, and does not offer caution for performance, N° 95. *Will* contra *Urquhart*, Jan. 5. 1754.

The magiſtrates and jailor are not liable for the debt, where the priſoner eſcaped by knocking down the jailor, N° 218. *Thomſon* contra *the magiſtrates of Stirling*, Dec. 8. 1756.

PRIVILEGED DEBTS. The King has no preference upon land-eſtates by adjudication for revenue-debts; but other adjudgers within year and day are intitled to be ranked *pari paſſu* with him, N° 112.

*Creditors*

*Creditors of Burnet* contra *James Murray* 17th July 1754.

*See* Funeral charges, N° 57.

PROCESS. When the decreet of an inferior judge is turned into a libel by the court of ſeſſion, the original libel, as well as the decreet, falls under the cogniſance of the court, N° 24. *Clerks ſupplicants*, July 4. 1752.

The informations given in to the court of ſeſſion, ordered to be ingroſſed in the extract of the decreet if either party inſiſt for it, N° 73. *Douglas* againſt *Douglas*, March 7. 1753.

A defender dying during the dependence of a proceſs before a ſheriff; and his repreſentatives living out of the kingdom, they muſt be called by a tranſference before the court of ſeſſion, and the other proceſs advocated, N° 120. *Roſs* contra *Maxwell*, Dec. 11. 1754.

A Decreet of conſtitution, on which an adjudication followed, was found null, becauſe, by the general charge, the predeceſſor was deſcribed as father to the infant, not as his grandfather, which he was in fact, N° 155. *Forbes of Culloden* contra *the repreſentatives of Hemprigs*, July 6. 1755.

Annualrent found due to a merchant from the term of payment ſpecified in a miſſive letter, though not ſtipulating annualrent; but the random expences decerned for in a decreet of conſtitution were not allowed, N° 223. *Creditors of Frackaſield*, Dec. 14. 1756.

PROOF. A perſon purſuing as executor, for payment of a bond due to one ſaid to be dead, muſt prove the death, and the decreet dative is not ſufficient evidence thereof, N° 56. *Burn* contra *Ogilvie*, Jan. 2. 1752.

A perſon became bound, for a ſum paid, to convey all debts, and the grounds thereof, due to him by a third party; one of the grounds of debt was loſt; he was allowed to prove that it was known by all parties to be loſt at the time of the agreement, N° 131. *William Crawford* contra *Thomas Macfie*, Jan. 24. 1755.

A verbal promiſe by a leſſor, which induced the leſſee, as he contended, to enter into a written agreement, not probable by witneſſes, N° 137. *Magiſtrates of Glaſgow* againſt *Macfait*, Feb. 15. 1755.

Facts inferring a previous courtſhip for marriage before the procreation of a child, may be proved by witneſſes, N° 164. *Smith* and *Grierſon* contra *Grierſon*, Nov. 26. 1755.

PROVISION TO HEIRS AND CHILDREN. Proviſion in a contract of marriage in favour of the children of the marriage, is binding on the eldeſt ſon, on whom the father ſettled the fee of an eſtate, acquired during the marriage; though at the date of that ſettlement the father had ſufficient ſeparate funds for ſatisfying the proviſion, N° 12. *Ouchterlonies* contra *Gilbert Ouchterlony*, June 12. 1752.

Bonds of proviſion by a father in favour of his children, upon a narrative of their being unprovided for, preſumed to come in place of the proviſions in his contract of marriage in their favour, though this be not expreſſed in ſuch bonds, N° 51. *Wauchop* contra *Gibſon*, Dec. 22. 1752.

In bonds of proviſion to children, a ſimple ſubſtitution of one child to another, does not bar gratuitous alienation. Here the bond of proviſion came in place of a proviſion in a contract of marriage which contained no ſubſtitution, N° 51. *Wauchop* contra *Gibſon*, Dec. 22. 1752.

When a father becomes bound, in a poſtnuptial contract of marriage, to pay certain ſums to the children born or to be born of the marriage, at the firſt term after the deceaſe of himſelf and his wife, the children cannot compete with onerous creditors of the father, N° 102. *Creditors of Strachan* againſt *Strachan*, July 1. 1754.

See *Solidum et pro rata*, N° 221.

See *Periculum*, N° 50.

PUBLIC OFFICER. The clerk of the general ſeſſions at Glaſgow was not found removeable at pleaſure, but for reaſonable cauſes, although the office was not expreſsly conferred upon him during pleaſure, nor during life, N° 210. *Thomas Harvie* contra *Matthew Bogle*, July 27. 1756.

R

RANKING and SALE. Decreet of ſale does not deprive perſons of their right, who were not parties in the proceſs, not derived right from the bankrupt's predeceſſors, N° 84. *Urquhart* contra *officers of ſtate*, July 28. 1753.

RECOMPENSE. A perſon detained a hoſtage, after the capture of a veſſel, until an exchange of priſoners be made, found intitled to wages and maintenance from thoſe who thereby obtained their liberty, N° 80. *Jamieſon* contra *Hutton*, July 20. 1753.

If a liferenter repair a ruinous ſubject liferented, ſhe will have repetition of the whole expence at the end of the liferent, N° 148. *David Scott* contra *Phœbe Forbes*, March 5. 1755.

REDEMPTION. A declarator of redemption, equivalent to an order of redemption, N° 194. *Duke of Gordon* againſt *Macpherſon*, March 2. 1756.

In this caſe it was debated, but not decided, whether conſignation in bank-notes was equivalent to conſignation in gold and ſilver, which was ſtipulated in the clauſe of reverſion.

REI

REI VINDICATIO. A piece of cloth sent by a weaver to a bleachfield, with his name and mark upon it, being the property of a third party, can only be retained for the price of bleaching that piece, and not for the whole cloth sent by the weaver; the proprietor proving, that the cloth belonged to him, and not to the weaver, No 33. *Leslie* contra *Hunter*, July 30. 1752.

REMOVING. The infant-heir of a late tacksman must be warned to remove, and it is not sufficient to warn a person who is in possession for his behoof, No 94. *Grant* contra *Grant*, Dec. 18. 1753.

The warning found null, where the tenant whose entry was at Martinmas, was warned to remove at Whitsunday, No 104. *Earl of March* contra *Dowie*, March 6. 1754.

Found, that miners, artificers, and labourers, about lead-mines, might be removed from the houses which they possessed without paying rent, upon fifteen days premonition, without necessity of warning before Whitsunday, reserving to them action for their expences in building or repairing these houses, No 202. *Duke of Queensberry* contra *Telfer*, March 11. 1756.

REPARATION. A messenger being prevented from pounding by another messenger, the creditor thus excluded, was brought in *pari passu* with the other pounder *pro rata* of the debts, No 179. *Murray* contra *Mansfield*, Jan. 17. 1756.

Creditors who consented to the relict's intromission with the goods of a defunct, after they had been sequestrated by the commissary-court, and received payment of their debts from the relict, were found liable to the other creditors of the defunct *in valorem* of their intromissions, No 200. *Cuming* contra *Hart*, March 9. 1756.

RETENTION. See *Rei vindicatio*, No 33.

RES INTER ALIOS. During the dependence of a declarator of the right to an estate, the cause being ready for judgment, the defender died, having disponed his whole estate, comprehending that in question, to trustees; the action was transferred against his son; he refused to enter heir, or to defend; judgment was given for the pursuer; this was found not to be *res judicata* as to the trustees, No 38. *Gowdie* against *the tenants of Maison-Dieu*, Nov. 28. 1752.

REVOCATION. A letter is not sufficient revocation of a bond revocable at pleasure, though it is sufficient to stop an annuity payable during pleasure, No 66. *Haldane* contra *Duke of Douglas*, Feb. 15. 1753.

ROUP. *See* Fraud, No 87.

S

SALE. Found that *emptio hereditatis* did not convey to the buyer a separate debt which stood in the person of the seller affecting the estate which he had sold as heir, No 219. *Neill* contra *Campbell*, Dec. 14. 1756.

SEALS. *See* King, No 172.

SEISIN. A seisin of a right of patronage, bearing in general *juris solennitatibus consuetis, debite observatis*, was found sufficient, No 84. *Urquhart* contra *Officers of state*, July 28. 1753.

The extract of a seisin found sufficient although the signum of the notary was not ingrossed in the record, *ibid.*

SEQUESTRATION. An estate strictly entailed, having been sequestrated by the court of session, their Lordships ordered leases thereof for nineteen years to be made, the heir of entail offering no objection, No 135. *Mr Neil Campbell, &c. supplicants*, Feb. 12. 1755.

SERVICE OF HEIRS. A service bearing that one was nearest and lawful heir of tailzie to her brother in general, was found sufficient, although it did not mention the date of the tailzie by which she was heir, No 90. *Forbes* contra *Maitland*, Aug. 12. 1753.

SERVITUDE OF STILLICIDE. Servitude of stillicide, No 11. *Dr Stirling* against *Commissary Finlayson*, June 11. 1752.

SOLIDUM ET PRO RATA. A sum of money being mortified to certain purposes, and five persons named as trustees for carrying it into execution, it was found, that the two only accepting trustees had power to act, and also that tho' the whole trustees had renounced, the mortification would not thereby have become void, No 32. *Campbell* contra *Lord Monzie*, &c. July 26. 1752.

A cautioner for two persons who are *ex facie* co-obligants in a bond, is intitled to a total relief against both, although it appeared by a separate deed, that one of them was only cautioner for the other, No 168. *Mackenzie* against *Mackenzie*, Nov. 30. 1755.

A provision to children of a first marriage, which the father was bound to lay out on annualrent, being declared a burden upon the infeftment of a wife and children of a second marriage, was found to affect the second wife's liferent for the annualrents, and the childrens fee for the principal, No 221. *Paton* contra *Alexander*, Dec. 14. 1756.

*See* Glebe, No 171.

STIPEND. A minister admitted upon a presentation from the patron last in possession, found intitled to the stipend during his incumbency, although another was afterwards found to have a preferable right to the patronage, No 70. *His Majesty's Advocate* against *Dick*, March 2. 1753. This was reversed on appeal.

SUCCESSION. An heir of provision who succeeded as nearest heir, at the time the succession opened, was found to be obliged to denude upon the existence of a nearer heir, although the entail contained no denuding clause in that event, No 204.

*Mackinnon* contra *Mackinnon*, June 16. 1756.

SUPERIOR. A superior who has a considerable feu-duty payable to him out of the vassal's lands, may interpose to prevent the lands from being deteriorated by the fodder's being yearly carried off the land, N° 174. *Hamilton of Pancaitland, supplicant*, Jan. 13. 1756.

SUSPENSION. A person who did diligence on a bill after a decreet decerning him to deliver it up, was found liable in damages and expences, though he had, before doing diligence, obtained suspension of the decreet, N° 151. *Ogilvy* contra *Robertson*, March 6. 1755.

SURROGATUM. *See* Competition, N°16.

T

TAILZIE. Part of an estate strictly entailed was, on the petition of the person in possession, ordained by act of parliament to be sold for payment of certain debts said to affect the estate; the heirs of entail were declared to be parties to this act. The price which the estate gave, having been exhausted by the debts foresaid, it was found not competent for an heir of entail to plead in a count and reckoning, before the court of session, that some of those debts did not affect the entailed estate, No 19. *Mackenzie* against *Stewart*, July 1. 1752. This was reversed on appeal.

An estate found to be carried by forfeiture from the whole substitutes of an entail, where the tailzie was not recorded, and contained no clause, irritating the contravener's right, or prohibiting to sell, the forfeiting person being apparent heir to the entailer, and having done no deed acknowledging the entail, N° 63. *Hay* against *his Majesty's Advocate*, Feb. 9. 1753.

While an entail remains a personal deed, and is made the title of possessing the estate, it will affect the creditors of the heir in possession, although it has not been recorded, and although the provisions and irritant clauses have not been repeated in the title-deeds of such heir, N° 91. *Creditors of Carleton* contra *William Gordon*, Nov. 21. 1753.

Where a tailzie contained a power to burden with 50,000 merks for younger children, and specially provided 30,000 merks of that 50,000 merks to the daughter of the tailzier's son; the said entailer's son having, after his succession, granted bond for 20,000 merks more to the said daughter, it was found that the heir of line of that heir of entail was liable to relieve the entailed estate of the interest of the 20,000 merks which fell due during the said heir of entail's possession, but not to relieve it of the interest which fell due on the 30,000 merks.

2*do*, Where the entail reserved a power to the heirs of entail to grant feus at the rate of a certain feu-duty for each fall of houses, a feu of a considerable tract was sustained, though discharged of thirlage, minister's stipend, cess, and public burdens, and of the irritancy *ob non solutum canonem*, and the duplication at the entry of heirs.

3*tio*, Where the tailzie reserved a power to the heir to let tacks for nineteen years, the tack of the rents of a barony was sustained, although many of the tenants had tacks for terms to run.

4*to*, But a tack of the mansion-house, and pleasure-ground round it, was reduced.

5*to*, Found, that a contract of sale of the wood upon the estate could not take effect after the death of the heir of entail-contractor, N° 132. *Lord Cathcart* contra *Stewart Nicolson-Schaw*, Jan. 31. 1755.

A clause in an entail, impowering the heir of tailzie to provide wives or husbands in liferents to the extent of a third, found sufficient to impower the first institute, and the next apparent heir jointly, to settle a third upon the wife of the said next apparent heir, although the said apparent heir, after surviving the first institute, never completed his titles to the estate, N° 182. *Houston of Johnston* contra *Nicolson of Carnock*, Jan. 28. 1756.

*See* Sequestration, N° 135.

TEINDS. Rental-bolls not the rule for valuation, unless when parties consent, N° 69. *Earl of Morton and Stewart* contra *Marquis of Tweeddale and officers of state*, Feb. 28. 1753.

Contrary usage for forty years by possessing on tacks containing a different *reddendo*, bars approbation of the reports of the subcommissioners for valuation of teinds, N° 69. *The Earl of Morton and Captain Stewart* contra *the Marquis of Tweeddale and officers of state*, Feb. 28. 1753.

The following clause was found to give right to teinds, *una cum advocatione, donatione, et jure patronatus parochiæ de—— cum decimis rectoriis et vicariis ejusdem*, No 81. *Spalding* contra *Heritors of Kirkmichael*, July 20. 1753.

The teinds which belonged to the abbacy of Dunfermline are saleable, N° 175. *Dundas* contra *officers of state*, Jan. 14. 1756.

A minister in one parish found intitled to possess certain teinds out of another parish, whereof he had been upwards of forty years in possession, in virtue of a decreet of the commission of teinds, N° 184. *Minister and heritors of Eyemouth* contra *officers of state*, &c. Feb. 4. 1756.

TERCE. *See* Forfeiture, N° 185.

THIRLAGE. None but the proprietor of the thirlage can erect a corn-mill within the bounds thereof, nor will caution be received that he will grind only corns not thirled, N° 54. *Urquhart* contra *Tulloch of Tannachy*, Dec. 26. 1752.

No multure is due by a tenant who is bound to pay multures for all corn produced on his

his farm, or brought in for the use of his family, if his whole farm be kept in grass, and neither he nor his family reside on the grounds astricted, No 166. *Grant* against *Miln*, Nov. 28. 1755.

TRUST. An heritable bond being taken in name of certain trustees, and their heirs, for behoof of the children of a marriage, and the trust having devolved upon an infant, who refused to represent, in an action at the instance of the heir of the marriage; the Lords declared the trust, and ordained the superior to grant charters and precepts for infesting the pursuer, N° 203. *Dalziel* contra *Dalziel and Henderson*, March 11. 1756.

W

WITNESS. A witness liable to be set aside, because of proximity of blood to one of the parties, cannot be received, although he is of the same relation to the other party, No 48. *Park* contra *Dalrymple*, Dec. 19. 1752.

Tutors admitted as witnesses for their pupils, where the fact to be proved was, whether the pupil's father had, or had not received money from his brother, which he lent out with his own, in bonds in his name, with a substitution to his brother, N° 144. *Bethia Yule* contra *Joseph Yule*, Feb. 28. 1755.

WRIT. The objection, that the attestation of the notary to a seisin did not mention the number of leaves whereof the seisin consisted, repelled, in respect that the regulations of the act 1686 had not been strictly observed, N° 2. *Clark* against *Waddel*, Feb. 7. 1752.

In the testing clause of a deed, "before the "witness, and witness to the marginal "notes," was held equivalent to witnesses [this deed was *inter rusticos*], N° 43. *Bromfield* against *Young*, Dec. 7. 1752.

If one of two instrumentary witnesses be designed brother-german, when he was, in fact, brother-in-law, the writ is null, No 55. *Creditors of Graham* contra *Grierson*, Dec. 26. 1752.

Missive letters, though not holograph, found sufficient to establish a tack of lands for five years, where the setter acknowledged his subscription, and the tack had taken effect by possession, No 72. *Barron* contra *Duncan*, March 6. 1753. *See* Freeholder, No 163.

A deed, where the clause containing the names and designations of the witnesses was wrote partly below the subscription of the parties, found not null by act 1681, which requires them to be inserted in the body of the writ, N° 75. *Dury and Doig* against *Dury*, March 11. 1753.

In deeds bearing date before the statute 1681, if the witnesses are not designed, the user of the deed must condescend on the designation of the witnesses, and astruct the same, otherwise the deed is null, N° 84. *Urquhart* contra *officers of state*, July 28. 1753.

A tack null for the want of the witnesses subscriptions, found validated by the tacksman's possession, N° 94. *Grant* contra *Grant*, Dec. 18. 1753.

*See* Freeholder, No 163.

WRONGOUS IMPRISONMENT. In forgery, the person accused has not the benefit of running his letters in terms of the act 1701, N° 115. *His Majesty's Advocate* contra *Cameron of Fassefearn*, Aug. 9. 1754.

*FINIS.*

N

S